IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-155

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter,

Appellants,

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors,

Appellants,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company,

Appellant,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors,

Appellants,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company,

Appellant,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeal From the Judgment of the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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REFERENCE TO OPINIONS BELOW.

The court below initially rendered no opinions.

On appeal, this Court vacated and remanded for clarification of the record. *Philadelphia Newspapers, Inc. v. Jerome*, 54 L. Ed. 2d 506 (1978) (*per curiam*). A copy of the Court's Opinion is appended hereto as Exhibit 1.

The Opinion of the Pennsylvania Supreme Court following remand is not yet reported. A copy of that opinion is appended hereto as Exhibit 2.

STATEMENT OF GROUNDS FOR JURISDICTION.

This Court has jurisdiction over these appeals pursuant to 28 U. S. C. § 1257(2) in that these appeals are taken from an Order of the Supreme Court of Pennsylvania reinstating judgments previously vacated by this Court, which judgments uphold certain Pennsylvania Rules of Criminal Procedure against claims of repugnancy to the Constitution of the United States, specifically, the First, Fifth, Sixth, and Fourteenth Amendments thereto. The Pennsylvania Rules of Criminal Procedure are the equivalent of statutory enactments by the Legislature, have the force and effect of law, and all laws inconsistent with the Rules are deemed suspended. Constitution of the Commonwealth of Pennsylvania, Article V, § 10(c). *Commonwealth v. Levesque*, 97 Dauph. 475 (Pa. C. P. Dauph. 1975); *Gonzales v. Procaccio Truck. Co.*, 1 P. C. R. 24, 28-29 (C. P. Phila. 1978).

The proceedings below were originally brought to gain access by the press and public to pretrial suppression hearings in three separate criminal proceedings. The Pennsylvania Supreme Court in 1977 denied Petitions seeking vacation of the trial courts' orders closing pretrial hearings and sealing and impounding all papers, documents, and records filed in the cases of *Commonwealth of Pennsylvania v. W. A. "Tony" Boyle*, Court of Common Pleas of Washington County, Pennsylvania, Nos. 650A, 650B, and 650C March Session 1974; *Commonwealth of Pennsylvania v. Palmer*, Court of Common Pleas of Montgomery County, Pennsylvania, No. 149-77; and *Commonwealth of Pennsylvania v. Phillips*, Court of Common Pleas of Montgomery County, Pennsylvania, No. 5060-76. Following appeals therefrom, this Court, by decision and Order of January 9, 1978, vacated the orders of

the Pennsylvania Supreme Court and remanded these cases to that court to clarify the record. 54 L. Ed. 2d 506 (1978). On April 28, 1978, the Pennsylvania Supreme Court reinstated its prior determination holding that "the challenged Rules and orders are closely tailored to protecting both the constitutional right of defendants to a fair trial and the public's interest in the fair and efficient administration of criminal justice." Ex. 2, p. 51.

A Notice of Appeal was filed on July 26, 1978 in the Supreme Court of Pennsylvania. The Notice of Appeal is appended hereto as Exhibit 3. This single Jurisdictional Statement is filed on behalf of all appellants in their appeal from the Order of the Supreme Court of Pennsylvania. See Rule 15, 3 of this Court.

The text of the Pennsylvania Rules of Criminal Procedure validity of which is challenged by this appeal is as follows:

Rule 323. Suppression of Evidence

(a) The defendant or his attorney may make application to the court to suppress any evidence alleged to have been obtained in violation of the defendant's constitutional rights.

(b) Unless the opportunity did not previously exist, or the interests of justice otherwise require, such application shall be made only after a case has been returned to court and not later than ten days before the beginning of the trial session in which the case is listed for trial, except that in any judicial district having continuous trial sessions said application shall be filed not later than ten days before the day the case is listed for trial. If timely application is not made hereunder, the issue of the admissibility of such evidence shall be deemed to be waived.

(c) Such application shall be made to the court of the county in which the prosecution is pending.

(d) The application shall state specifically the evidence sought to be suppressed, the specific constitutional grounds rendering the evidence inadmissible, and shall state with particularly the facts and events in support thereof.

(e) Upon the filing of such application, a judge of the court shall fix a time for hearing, which may be either prior to or at trial, and which shall afford the attorney for the Commonwealth a reasonable opportunity for investigation and answer, and shall enter such interim order as may be appropriate in the interests of justice and the expeditious disposition of criminal cases.

(f) *The hearing, either before or at trial, shall be held in open court unless defendant, by his counsel, moves that it be held in the presence of only the defendant, counsel for the parties, court officers and necessary witnesses. In any event, the hearing shall be held outside the hearing and presence of the jury. In all cases the court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 326 and 327.*

(g) *A record shall be made of all evidence adduced at the hearing. The clerk of court shall impound the record and the nature and purpose of the hearing and the order disposing of the application shall not be disclosed by anyone to anyone except to the defendant and counsel for the parties. The record shall remain thus impounded unless the interests of justice require its disclosure.*

(h) The Commonwealth shall have the burden of going forward with the evidence and of establishing the admissibility of the challenged evidence. The defendant may testify at such hearing, and, if he does so, he does not thereby waive his right to remain silent during trial.

(i) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's constitutional rights, and shall make an order granting or denying the relief sought.

(j) If the court determines that the evidence is admissible, such determination shall be final, conclusive and binding at trial, except upon a showing of evidence which was theretofore unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its admissibility. (emphasis supplied).

Rule 326. Special Orders Governing Widely-Publicized or Sensational Cases

In a widely-publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order. In such cases it may be appropriate for the

court to consult with representatives of the news media concerning the issuance of a special order.

19 Pa. S. (1977) (Rules Supp.)

Pursuant to the provisions of 28 U. S. C. § 2103, appellants ask the Court to regard this Jurisdictional Statement as a Petition for Writ of Certiorari in the event it is determined that this appeal has been improvidently taken.

QUESTIONS PRESENTED.

1. (a) Are the provisions of Pennsylvania Rules of Criminal Procedure 323(f) and (g), which require the closing of a pretrial hearing in a criminal case at the request of a defendant and mandate the impoundment of all records of the hearing, void on their face because they deny, in violation of the First, Fifth, Sixth, and Fourteenth Amendments, the public's right to be contemporaneously informed about court proceedings?

(b) Do the Rules effecting such denial without provision for hearing and with no showing as to (a) the nature and extent of pretrial news coverage and the potential for prejudice to the criminal defendant; and (b) whether other measures could protect the defendant's right to a fair trial without obliteration of the rights of the press and public violate those constitutional provisions?

2. Are Pennsylvania Rules of Criminal Procedure 323 (f) and (g) on their face and 326, as applied in this case, pursuant to which the trial courts entered orders which (i) closed their courtrooms; (ii) sealed official court records; and (iii) prohibited parties, witnesses, attorneys, and others from communicating with the press, thus totally prohibiting, with no hearing or showing of potential prejudice, publication of any news concerning important criminal trials and pretrial proceedings, void in that they effect impermissible prior restraints on publication in violation of the First and Fourteenth Amendments?

STATEMENT OF THE CASE.

I. Philadelphia Newspapers, Inc., et al.[1] v. The Honorable Domenic D Ierome, Judge of the Court of Common Pleas of Delaware County.

This action arose from proceedings in the re-trial of W. A. "Tony" Boyle, former President of the United Mine Workers of America, in the Court of Common Pleas of Delaware County, Pennsylvania. Mr. Boyle's first trial, which resulted in a conviction for the execution-style slayings of a rival for union office and members of his family, received nationwide attention. The conviction was reversed by the Pennsylvania Supreme Court, and a new trial ordered.[2] On March 28, 1977, during pretrial proceedings on remand, the trial court entered a comprehensive order prohibiting parties, attorneys and their associates, all public officials, and others from, *inter alia*, releasing extrajudicial statements relating to the case, commenting upon any evidence, and disseminating any documents the admissibility of which might have to be determined by the court. On May 2, 1977, "all papers, documents and records filed and to be filed in this matter" were ordered sealed and impounded.[3] Also on May 2, 1977, the trial court orally ordered the courtroom cleared of all representatives of the press and public and thereafter commenced hearings on defense suppression motions behind closed doors. All of these orders were entered at the request of the defense and with the concurrence of the Commonwealth. No hearing was held, no findings as to the nature, extent, or irreparability of any potential prejudice were made, and no alternative and less restrictive methods of insuring a fair and impartial trial were considered.

On May 4, 1977, appellants filed a Petition to Vacate the trial court's orders. The trial court signed a Rule, returnable on May 9, 1977, *after* the scheduled completion date of the suppression hearings. Appellants thereupon filed with the Supreme Court of Pennsylvania, on May 4, 1977, Petitions for Writ of Mandamus and Prohibition and for Plenary Jurisdiction.[4] In these Petitions, appellants asserted that the trial court's orders infringed upon free speech and violated the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by spreading a pervasive cloak of secrecy over an important criminal trial with no prior showing of impending prejudice to the defendant's right to a fair trial.

On May 9, 1977, the trial court heard argument on the Petition to Vacate. Appellants contended specifically

1. The parties below were:

Philadelphia Newspapers, Inc., publisher of *The Philadelphia Inquirer* and *Philadelphia Daily News*, newspapers of general circulation throughout Pennsylvania and the Delaware Valley region; The Associated Press, a New York non-profit association which is the largest gatherer of news in the United States; Central States Publishing, Inc., publisher of *The Delaware County Times* of Delaware County, Pennsylvania; The Pennsylvania Newspaper Publishers Association; The Pennsylvania Society of Newspaper Editors; and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, which are professional associations of Pennsylvania journalists.

2. *Commonwealth v. Boyle*, 470 Pa. 343, 386 A. 2d 661 (1977).

3. Because of the impoundment order, those orders themselves, which directly abridged appellants' rights to observe and report the news, were not made available to appellants until released by the trial court for the purpose of this litigation.

4. The Petition for Plenary Jurisdiction was filed pursuant to § 205 of Pennsylvania's Appellate Court Jurisdiction Act, 17 Pa. S. § 211.205, which provides for the assumption by the Supreme Court of plenary jurisdiction over matters of immediate public importance with authority to enter orders to "cause right and justice to be done."

that the Pennsylvania Rules of Criminal Procedure were unconstitutional (Transcript of Hearing Before The Honorable Domenic D. Jerome in *Commonwealth v. W. A. "Tony" Boyle*, May 9, 1977, p. 15). Appellants also asserted that prior to the entry of orders which closed the courtroom, sealed all records, and imposed a "gag," a hearing should have been held to determine the propriety of the orders under the circumstances and to ascertain whether "more narrow orders could be drawn which might protect the rights of the defendant without unduly infringing upon the rights of the press" (*Id.* at pp. 9-10). The trial judge ruled that he was obligated to accord *prima facie* validity to the Pennsylvania Supreme Court's Rules and denied the Petition to Vacate.

On May 23, 1977, the Pennsylvania Supreme Court denied both Petitions for Mandamus and for Plenary Jurisdiction, thus rejecting appellants' claims as to the constitutional infirmity of the Pennsylvania Rules of Criminal Procedure. On a prior appeal to this Court (No. 77-308), based upon the substantial federal questions presented herein, the Court on January 9, 1978 exercised its appellate jurisdiction and vacated the judgment of the Pennsylvania Supreme Court and remanded the case for clarification of the record. 54 L. Ed. 2d 506

On April 28, 1978, the Pennsylvania Supreme Court reinstated its prior judgment Orders and filed an opinion in connection therewith again rejecting appellants' claims as to the substantive and procedural constitutional infirmity of the Pennsylvania Rules of Criminal Procedures to which this appeal is directed.

II. Montgomery County Cases.

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, et al.[5] v. The Honorable Robert W. Honeyman; and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, et al. v. The Honorable Lawrence A. Brown.

Montgomery Publishing Company [6] v. The Honorable Robert W. Honeyman; and Montgomery Publishing Company v. The Honorable Lawrence A. Brown.

These actions were filed in connection with two separate criminal trials pending in the Court of Common Pleas of Montgomery County, Pennsylvania: *Commonwealth v. John Palmer*, No. 149-77 and *Commonwealth v. Larry J. Phillips*, No. 5060-76. The defendant in the *Palmer* case was a policeman charged with the kidnap-murder of a young girl. The defendant in *Phillips* was accused of murdering a Montgomery County policeman. In both cases, the trial courts entered orders, pursuant to the Pennsylvania Rules of Criminal Procedure, which closed the courtrooms to the press and public during pretrial hearings,

5. The parties below were:

Equitable Publishing Company, Inc., publisher of *The North Penn Reporter* of Lansdale, Montgomery County, Pennsylvania and *The Town and Country* of Pennsburg, Montgomery County, Pennsylvania., and owner and operator of radio station WNPV of Lansdale, Montgomery County, Pennsylvania;

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter; The Pennsylvania Newspaper Publishers Association; and The Pennsylvania Society of Newspaper Editors, professional associations of Pennsylvania journalists.

6. Montgomery Publishing Company is the publisher of ten newspapers distributed in Montgomery County, Pennsylvania.

sealed and impounded all records of the hearings, and prohibited parties, attorneys, police officers, prospective witnesses, and others from discussing or commenting upon the cases. Petitions to Vacate the trial courts' orders, raising the identical issues as in *Philadelphia Newspapers, Inc. v. Jerome,* were filed in each action. These Petitions were denied for lack of standing. Thereafter, Petitions for Mandamus and/or Prohibition and Petitions for Assumption of Plenary Jurisdiction were filed with the Supreme Court of Pennsylvania. All Petitions were denied without opinion on June 20, 1977.

On the prior appeal to this Court (No. 77-308), brought together with *Philadelphia Newspapers, Inc. v. Jerome* pursuant to the Court's Rule 15, 3, the Court on January 9, 1978 vacated the judgment of the Pennsylvania Supreme Court in all cases and remanded for clarification of the record. 54 L. Ed. 2d 506.

On April 28, 1978, the Pennsylvania Supreme Court reinstated its prior judgments in all cases and filed a single opinion in connection with them and *Philadelphia Newspapers, Inc. v. Jerome,* again rejecting appellants' claims as to the constitutional infirmity of the Pennsylvania Rules of Criminal Procedure to which this appeal is directed.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

I. Rules of Criminal Procedure Mandating Closed Pretrial Suppression Hearings and Impounded Court Records Based Solely on the Request of the Defendant and Without Hearing or Any Finding of Intending Prejudice, Violate Appellants' Fundamental Constitutional Rights.

In *Nebraska Press Assoc. v. Stuart,* 427 U. S. 539 (1976), this Court expressly left undecided issues relating to (a) the validity of the closing of pretrial proceedings with the consent of the defendant, and (b) judicially imposed restraints on lawyers and others. *Id.,* 427 U. S. at 564, n. 8. At issue here are cases in which, during a very brief period of time, three separate trial courts in important criminal prosecutions [7] closed pretrial hearings, sealed court records, and imposed broad restraining orders on attorneys and others, in reliance upon procedural rules permitting action merely upon motion of the defendant and affording no hearing to the parties excluded and foreclosed from access to the news. The courts below gave no consideration to less restrictive methods of assuring the particular criminal defendant's right to a fair trial, methods this Court has noted range from a vigorous *voir dire* of potential jurors to impaneling and sequestering a jury prior to the pretrial suppression hearing. *Id.*

Upon remand and without affording opportunity for further briefs or arguments by appellants, the Pennsylvania Supreme Court, adopting state-wide factual findings

7. In one, the once national president of the United Mine Workers of America was the murder defendant. In the second, a police officer was the defendant charged with murder. And in the third, also a murder case, the defendant was charged in connection with the death of a police officer.

of an essentially legislative nature, upheld the Rules of Criminal Procedure it adopted as constituting "an appropriate procedural device for the administration of a state court system of criminal justice." Ex. 2, at pp. 59-60.

It is imperative for this Court to take these appeals and decide whether and, if so, under what circumstances, pretrial proceedings in criminal cases may be closed in response to assertions of possible prejudicial publicity. Courts throughout the country, in their zealous and frequently misguided desire to protect the Sixth Amendment rights of criminal defendants, have been closing courtrooms and sealing court records with dangerously increasing frequency.[8] The limits of a trial court's power to deny public access to information concerning crucial stages of the criminal process should be tested, and a decision on these appeals, after full briefing and argument, is necessary for the preservation of fundamental constitutional rights under the First, Fifth, Sixth, and Fourteenth Amendments.

The Pennsylvania Supreme Court upheld the constitutionality of its own Rules which provide for the closing of suppression hearings and sealing of records at the whim of a defendant, without inquiry into the probability of harm from publication or the interests of the public in open criminal judicial proceedings, either generally or in a particular case. It did so by creating an irrebuttable presumption of prejudice to the fair trial right of any defendant requesting a closed hearing. Such blanket exclusion of the news media from judicial proceedings ignores the unique role of the media in reporting criminal trials and pretrial proceedings, as recognized by this Court in *Cox Broadcasting Co. v. Cohn*, 420 U. S. 469, 491-92 (1975):

8. See 46 U. S. L. W. 2534 (1978).

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

See also, *Sheppard v. Maxwell*, 384 U. S. 333, 349-50 (1966); *Estes v. Texas*, 381 U. S. 532, 541-42, *reh. den.* 382 U. S. 875 (1965); *Craig v. Harney*, 331 U. S. 367, 374 (1947).

It is meaningless to say that the press is free to publish truthful information about criminal proceedings when press and public can be and are denied access to the courtroom and to the official records of the proceedings therein, so that information about important judicial proceedings cannot be gathered and reported to the public at large.

Few traditions in this country are more deeply rooted in our legal history than that of the administration of justice in public view. *United States v. Cianfrani*, 573 F. 2d 835, 847-848 (3d Cir. 1978). Only recently have we seen the wide assault on that tradition exemplified by the orders in these cases. The foundation for the tradition of

public trials and pretrial proceedings was succinctly described by this Court in *In Re Oliver*, 333 U. S. 257, 268-270 (1948):

> "'The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. . . . The knowledge that every criminal trial is subject to contemperaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"[9]

More recently, in *Craig v. Harney, supra*, 331 U. S. at 374, this Court declared:

> "A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

In an action like the *Boyle* murder retrial involving the former head of one of the nation's most powerful labor unions, or in entirely different factual contexts, as in the *Palmer* and *Phillips* cases, involving the murder of a policeman and a young girl, courts must fully investigate the potential for prejudice prior to entering orders

9. Pretrial hearings are an integral part of the "trial." See *Kirby v. Illinois*, 406 U. S. 682, 689-90 (1972); *United States ex rel. Bennett v. Rundle*, 419 F. 2d 599 (3d Cir. 1969) (en banc); *United States v. Cianfrani, supra; United States v. Clark*, 475 F. 2d 240 (2d Cir. 1973).

restricting the public's access to court proceedings. In all of these actions, each with entirely different facts, the trial courts entered virtually identical orders at the mere request of the defendants. Secret or closed judicial proceedings are the antithesis of the orderly operation of our public institutions. Secrecy breeds suspicion, distrust, and rumor, or what may be worse, encourages public apathy and indifference. Public confidence in the administration of justice is directly served by judicial proceedings open to public scrutiny. Numerous courts throughout the country have held that the public has a cognizable constitutional interest in keeping trials open.[10] The First and Sixth Amendments command that, absent extraordinary circumstances, criminal proceedings be public. As the Court has most recently stated:

> "The requirement of a public trial is satisfied by the opportunity of members of the public and the press

10. *See, e.g., United States v. Cianfrani, supra; United States ex rel. Lloyd v. Vincent*, 520 F. 2d 1272, 1274 (2d Cir.), *cert. denied* 423 U. S. 937 (1975); *Lewis v. Peyton*, 352 F. 2d 791, 792 (4th Cir. 1965); *United States v. Kobli*, 172 F. 2d 919, 924 (3d Cir. 1949); *United States v. Sorrentino*, 175 F. 2d 721, 722-23 (3d Cir.), *cert. denied* 338 U. S. 868, *reh. denied* 338 U. S. 896 (1949); *WXYZ v. Hand*, 3 Med. L. Rptr. 1430 (E. D. Mich. 1977); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199, 204 (D. N. J. 1971); *Keene Pub. Corp. v. Keene District Court*, 380 A. 2d 261 (N. H. Sup. Ct. 1977); *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St. 2d 457, 351 N. E. 2d 127 (1976); *State ex rel. Gore Newspaper Company v. Tyson*, 313 So. 2d 777 (Fla. App. 4th Dist. 1975); *Citizen Publishing Company v. Buchanan*, 22 Ariz. App. 521 (1974); *People v. Hinton*, 31 N. Y. 2d 71, 75, 334 N. Y. S. 2d 885, 286 N. E. 2d 265 (1972), *cert. denied* 410 U. S. 911 (1973); *Oliver v. Postel*, 30 N. Y. 2d 171, 331 N. Y. S. 2d 207 (1972); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 490 P. 2d 563 (1971); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968); *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P. 2d 594 (en banc 1966); *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N. E. 2d 896 (1955), *appeal dismissed as moot*, 164 Ohio 261, 130 N. E. 2d 701 (Sup. Ct. 1955); *Kirtowsty v. Superior Court*, 143 Cal. Rptr. 2d 745, 300 P. 2d 163 (Ct. App. 1956).

> to attend the trial and to report what they have observed." *Nixon v. Warner Communications, Inc.*, 55 L. Ed. 2d 570, 587 (1978).[11]

The Fifth Amendment's requirement of due process of law, applicable to the States through the Fourteenth Amendment, compels a full factual hearing at which must be established a constitutionally recognized basis for abrogating such precious First and Sixth Amendment rights of the public and the press.

The issues raised by the instant appeal are of profound national importance. Under what circumstances the criminal process can be closed from public view is an issue of immense concern to courts throughout the country, seeking appropriate methods to insure fair and impartial trials while preserving and protecting the interests of the public at large.[12] The Pennsylvania Rules of Criminal Procedure, which have now been construed by Pennsylvania's highest court to mandate closed proceedings at the mere request of a defendant, cannot meet constitutional muster. In numerous decisions, this Court has recognized that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assoc. v. Stuart, supra,* 427 U. S. at 554. See also, *Stroble v. California,* 343 U. S. 181 (1952); *Beck v. Washington,* 369 U. S. 541 (1962); *Murphy v. Florida,* 421 U. S. 794 (1975). At the very least, therefore, this Court should, after full hearing of these appeals, preclude the closing of criminal proceedings absent a showing

11. The criminal defendant himself has no right to compel a private trial. See *Singer v. United States,* 380 U. S. 24, 35 (1965).

12. See, *e.g.*, *Gannett Co., Inc. v. DePasquale,* No. 77-1301, certiorari granted May 1, 1978; *United States v. Cianfrani, supra; WXYZ v. Hand, supra; Brian W. v. Superior Court,* 3 Med. L. Rptr. 1993 (Cal. Sup. Ct. 1978); *Keene Pub. Corp. v. Keene District Court, supra.*

that (a) the nature and extent of pretrial publicity creates a clear and immediate threat to the fairness of the trial; and (b) no other available measures will be adequate so that closure is inescapably necessary in order to preserve the defendant's right to a fair trial.

> "In practical terms, this means 'that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity.' *Bennett v. Rundle,* 419 F. 2d 599, 607 (3d Cir. 1969) (in banc). This is necessary to insure that '[i]t is only under the most exceptional circumstances that [even] limited portions of a criminal trial may be even partially closed.' *Stamicarbon N. V. v. American Cyanamid Co.,* 506 F. 2d 532, 542 (2d Cir. 1974)."

United States v. Cianfrani, supra, at 854. The showing necessary to close proceedings should be made by the clear and convincing evidence[13] necessary to overcome the heavy presumption against constitutional validity[14] of any order restricting publication of information ordinarily in the public domain.

The Court has granted review, by writ of certiorari, of similar questions as those presented in this appeal. *Gannett Co., Inc. v. Hon. Daniel A. DePasquale,* No. 77-1301. This case, however, presents an additional factor not involved in *Gannett Co., Inc.,* namely, a state-wide court rule which, without affording any opportunity for

13. This Court has adopted the "clear and convincing evidence" standard in other contexts involving protection of First Amendment freedoms. See, *Gertz v. Robert Welch, Inc.,* 418 U. S. 323, 342 (1974); *New York Times Co. v. Sullivan,* 376 U. S. 254, 285-86 (1964). Cf. *Landmark Communications, Inc. v. Virginia,* 56 L. Ed. 2d 1, 12-13 (1978).

14. *Times-Picayune Publishing Corp. v. Schulingkamp,* 419 U. S. 1301, 1307 (1974) (In Chambers Opinion of Powell, J.); *New York Times Co. v. United States,* 403 U. S. 713, 714 (1971).

hearing in any particular case, *requires* a closed court and exclusion of the press and public whenever triggered by the request of the criminal defendant. The court below, rather than adjudicating the relevant facts of this case,[15] found the Pennsylvania Rules of Criminal Procedure here at issue to be constitutional based upon findings which are general in nature and can best be described as "legislative" facts. Such findings are clearly inadequate to support the trial court closures. *Landmark Communications, Inc. v. Virginia, supra,* 56 L. Ed. 2d at 13-14. Appellants anticipate that this case may appropriately be consolidated in this Court with the *Gannett Co., Inc.* case.

The public's fundamental right to be informed of the criminal process is involved in this case. In view of the sweeping effect of the Pennsylvania Rules of Criminal Procedure here challenged, which place a mantle of secrecy around integral portions of criminal trials, it is of the utmost importance that this Court take and decide this case. Further, in view of the nationwide dilemma faced by trial courts in dealing with prejudicial publicity and efforts of defense counsel to foreclose public proceedings, it is imperative for the Court to hear and decide this appeal, and to establish guidelines for the co-existence of the rights and interests of criminal defendants and those of the public at large.

II. Rules 323(f) and (g) on Their Face and Rule 326, as Applied, Constitute Unconstitutional Prior Restraints on Free Speech and Press by Precluding all Access to Information About Pending Criminal Trials.

Although no order was entered by the trial courts directly enjoining publication by the news media, all pos-

15. Since the trial courts held no hearing to take evidence concerning the validity of the court closings, the Pennsylvania Supreme Court had no factual record to review.

sible sources of information concerning the cases were effectively closed to them. Such a pervasive denial of access to news about criminal proceedings constitutes, in effect, a prior restraint upon freedom of expression. Freedom of the press, if it is to mean anything, must include the right to publish contemporaneous accounts of criminal proceedings. That right is lost when, as in the cases now on appeal, the ability to publish is lost due to a total inability to gain information.

Long ago James Madison wrote, "A popular government, without popular information *or the means of acquiring it,* is but a prologue to a farce or a tragedy; or perhaps both." 9 *Writings of James Madison* 103 (G. Hurst, ed. 1910) (emphasis supplied). See also, Meiklejohn, *Free Speech and Its Relation to Self-Government,* at 39 (1948).

This Court has repeatedly emphasized that the general public's right to receive information, *Kleindienst v. Mandel,* 408 U. S. 753, 762-763 (1972), and the right of the press to gather news are protected by the First Amendment, for: "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes,* 408 U. S. 665, 681, 707 (1972). See also, *Red Lion Broadcasting Co. v. FCC,* 395 U. S. 367, 390 (1969); *Stanley v. Georgia,* 394 U. S. 557, 564 (1969); *Lamont v. Postmaster General,* 381 U. S. 321 (1965). Indeed, "the First Amendment protects not only the dissemination but also the receipt of information and ideas." *Houchins v. KQED, Inc.,* 46 U. S. L. W. 4830, 4834, 4837 (1978) (Stevens, J. dissenting). The restrictions imposed by the trial courts' orders effectively denied appellants access to any information concerning the pending criminal proceedings—the courtroom was closed, all records, motions, and papers filed were sealed and impounded, and all

persons having any connection with the case were prohibited from disclosing any information. This cloak of secrecy was and is so extensive as to conceal from the public even the date on which the trials were scheduled to commence.

The impounding of all records made of a pretrial suppression hearing is mandated by Pennsylvania Rule of Criminal Procedure 323(g).

The Pennsylvania Supreme Court has approved, in addition to closed courtrooms, the impounding of all records in the same criminal proceedings at the mere request of the defendant without benefit of any hearing for the parties directly affected by the rulings.[16] This, too, rebukes the history upon which our legal system is built. As Lord Coke observed long ago:

> "These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England and so is declared by an act of Parliament in 46 E 3." Access to Judicial Records, 175 A. L. R. 1260, 1261. (1948).

In the United States, the same principle has long been acknowledged. *Ex parte Drawbaugh*, 2 App. D. C. 404, 406-408 (1894); *Sloan Filter Co. v. El Paso Reduction Co.*, 117 Fed. 504, 506-507 (10th Cir. 1902).

By contrast to the Pennsylvania courts, the Court of Appeals for the Fourth Circuit, in reviewing an order impounding papers filed in the criminal proceedings against

16. In *Boyle*, all records in the action, including but not limited to records of the suppression hearing, were sealed at the request of defendant.

Maryland Governor Mandel, has held the impoundment order to be "an unnecessary prior restraint on freedom of the press," and issued a writ of mandamus vacating the impoundment order. *In Re Washington Post Company, et al.*, United States Court of Appeals for the Fourth Circuit, No. 76-1695, Writ of Mandamus issued July 19, 1976. See also, *WXYZ v. Hand, supra; Forcade v. Knight*, 416 F. Supp. 1025 (D. D. C. 1976); *Westinghouse Broadcasting Company, Inc. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976); *In Re Midwest Milk Monopolization Litigation*, 405 F. Supp. 118 (W. D. Mo. 1975); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974); *Northwest Publications, Inc. v. Anderson*, 3 Med. L. Rptr. 1302 (Minn. Sup. Ct. 1977); *Charlottesville Newspapers, Inc. v. Berry*, 215 Va. 116, 206 S. E. 2d 267 (1974).

Furthermore, the all-inclusive prohibition on dissemination of information concerning the trial or pretrial proceedings constitutes a prior restraint. In *CBS, Inc. v. Young*, 522 F. 2d 234, 240 (6th Cir. 1975), an order prohibiting those involved in a highly publicized criminal case from discussing the case with any member of the press or public was held to be "an extreme example of a prior restraint upon freedom of speech and expression . . . ." See also, *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975).

The orders entered by the trial courts denied any access to information concerning the pending criminal trials. The orders and the Pennsylvania Rules pursuant to which they were issued are clearly intended to restrict the flow of information, as distinguished from the restrictions upheld in *Pell v. Procunier*, 417 U. S. 817 (1974); *Houchins v. KQED, Inc., supra;* and *Nixon v. Warner Communications, Inc., supra.* Unquestionably, a trial court has the power to enter appropriate protective orders where neces-

sary to avoid a clear and imminent threat to the administration of justice and to preserve the defendant's right to a fair trial. Where, as here, however, the orders are tantamount to the imposition of a prior restraint, denying any access to and thus precluding publication of any information concerning the criminal trials, their entry must at the very least be supported by the same standards necessary to support any prior restraint. See *Nebraska Press Assoc. v. Stuart, supra; Northwest Publications, Inc. v. Anderson, supra.* Moreover, the Pennsylvania Rules of Criminal Procedure here challenged permit the entry of such orders without so much as a hearing, let alone the showing necessary to overcome the heavy presumption of invalidity. Accordingly, it is essential for this Court to declare the facial unconstitutionality of Rules 323(f) and (g) and the unconstitutionality of Rule 326, as applied in this case, which restrained the public's access to its courts without affording the slightest measure of procedural due process to those restrained.

It seems impossible to overstate the importance of the issues raised by the imposition of sweeping restrictive orders without any showing as to their necessity or validity. The decision on remand by the Pennsylvania Supreme Court has mandated a rule of total secrecy of significant judicial proceedings, drastically curtailing the constitutional rights of the press and public in the name of a "fair trial."

CONCLUSION.

Based upon the foregoing arguments and authorities it is requested that the Court note jurisdiction in this appeal, receive full briefs on the merits, and hear oral arguments in order to resolve the substantial federal questions here involved.

Respectfully submitted,

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EXHIBIT 1.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-308.

PHILADELPHIA NEWSPAPERS, INC., et al.,
Appellants,

v.

DOMENIC D. JEROME, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

— US —, 54 L Ed 506, 98 S Ct —

Decided January 9, 1978.

OPINION OF THE COURT

PER CURIAM.

The proceedings below were brought to gain access by the press and public to pretrial suppression hearings in three separate state criminal proceedings. Access was denied and the trial judge closed all pretrial hearings and sealed and impounded all papers, documents, and records filed in the cases. The judge also prohibited the parties, their attorneys, public officials, and certain others, from disseminating information concerning the hearings. Appellants then filed a petition for a writ of mandamus with the Supreme Court of Pennsylvania. However, this was denied without opinion. Appellants, arguing that they have been denied their federal constitutional rights, now urge us to take appellate jurisdiction of these matters under 28 USC § 1257(2) [28 USCS § 1257(2)].

As matters now stand, the record does not disclose whether the Supreme Court of Pennsylvania passed on appellants' federal claims or whether it denied mandamus on an adequate and independent state ground. For this reason, we vacate the judgment of the Supreme Court, and remand the cause to that court for such further proceedings as it may deem appropriate to clarify the record. See California v Krivda, 409 US 33, 34 L Ed 2d 45, 93 S Ct 32 (1972).

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, dissenting.

The Court today summarily vacates the judgment of the state supreme court and remands for further proceedings. Neither past decisions of this Court nor policy considerations support this unwarranted assumption of jurisdiction and imposition on the state courts.

The Pennsylvania Rules of Criminal Procedure permit a trial judge to close pretrial suppression hearings from the press and public at the request of the criminal defendant, mandate that all records of such hearings be sealed, and allow the judge in a "widely-publicized or sensational case" to prohibit parties and witnesses from making extrajudicial statements. This appeal stems from the entry of such orders in three Pennsylvania murder trials. In the first trial, appellants filed a Petition to Vacate the orders with the trial judge; on the same day, appellants also filed Petitions for Writ of Mandamus and Prohibition and for Plenary Jurisdiction with the Pennsylvania Supreme Court. The Petition to Vacate was denied by the trial judge after the suppression hearing on the ground, according to appellants, "that he was obligated to accord prima facie validity to the Pennsylvania Supreme Court's Rules."

The Pennsylvania Supreme Court two weeks later denied the Petitions for Mandamus and for Plenary Jurisdiction without opinion. Appellants filed similar Petitions to Vacate with the common pleas judges presiding over the other two trials; these petitions were denied on the ground that appellants lacked standing to challenge the orders. Appellants thereafter again filed Petitions for Mandamus and Prohibition and for Plenary Jurisdiction with the Pennsylvania Supreme Court which were denied without opinion.

We do not know why the Pennsylvania Supreme Court denied appellants' Petitions for Writ of Mandamus and Prohibition and for Plenary Jurisdiction.[1] There is no reason to presume that the petitions were rejected because the Pennsylvania Supreme Court disagreed with appellants' constitutional claims. The petitions were for extraordinary relief. The Pennsylvania Supreme Court has consistently emphasized that such petitions are "to be used only with great caution and forebearance and as an extraordinary remedy in cases of extreme necessity, to secure order and regularity in judicial proceedings if none of the ordinary remedies provided by law is applicable or adequate to afford relief." Such relief "is not of absolute right but rests largely in the sound discretion of the court. It will never be granted where there is a complete and effective remedy by appeal, certiorari, writ of error, injunction, or otherwise." Carpentertown Coal & Coke Co. Laird, 360 Pa. 94, 102, 61 A2d 426, 430 (1948). See

1. 17 Pa Cons Stat § 211.201 gives the Supreme Court of Pennsylvania "original but not exclusive jurisdiction" to issue writs of mandamus or prohibition to courts of inferior jurisdiction. 17 Pa Cons Stat § 211.205, entitled "Extraordinary Jurisdiction," permits the Supreme Court of Pennsylvania to assume plenary jurisdiction "on its own motion or upon petition of any party, in any matter pending before any court or justice of the peace of this Commonwealth involving an issue of immediate public importance."

also Commonwealth ex rel. Specter v Shiomos, 457 Pa 104, 320 A2d 134 (1974); Petition of Specter, 455 Pa 518, 317 A2d 286 (1974); Francis v. Corleto, 418 Pa. 417, 211 A2d 503 (1972).

While appellants claim that their petitions to the Pennsylvania Supreme Court drew into question the constitutional validity of the sections of the Pennsylvania Rules of Criminal Procedure described above, the Pennsylvania Supreme Court's denial of their petitions did not on its face decide in favor of the Rules' validity. Thus, it would not appear that we have jurisdiction to note the appeal under 28 USC § 1257(2) [28 USCS § 1257(2)].[2]

Of course, the denials may have been grounded on a decision by the Pennsylvania Supreme Court that the Rules do not violate the Federal Constitution. But this does not require that we vacate a presumably valid judgment of a state supreme court and remand for further proceedings. A less intrusive alternative, and one supported by past precedents of this Court, is to postpone consideration of jurisdiction until appellants have had an opportunity to demonstrate that the judgment appealed from does not rest on an independent and adequate state ground. See, e.g., Lynum v Illinois, 368 US 908, 7 L Ed 2d 128, 82 S Ct 190 (1961) (consideration of certiorari deferred "to accord counsel for petitioner opportunity to secure a certificate from the Supreme Court of Illinois as to whether the judgment herein was intended to rest on an adequate and independent state ground"); Herb v Pitcairn, 324 US 117, 89 L Ed 789, 65 S Ct

2. Section 1257(2) provides for Supreme Court review of final judgments rendered by the highest court of a State "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

459 (1945). By vacating the judgment below, this Court is taking the normal burden of demonstrating that we have jurisdiction off of appellant and placing it on the Supreme Court of Pennsylvania. We deny extraordinary relief regularly without typically expressing our reasons for so doing. We should not place a higher requirement on state supreme courts under penalty of this Court's vacating their judgment.

The Supreme Court of Pennsylvania did not affirm the orders of the trial judges. If it had and if there were reasonable doubt as to whether the affirmance were on state or federal grounds, the precedential and res judicata effects of the affirmance might call for vacating the judgment below. Cf. California v Krivda, 409 US 33, 34 L Ed 2d 45, 93 S Ct 32 (1972) (judgment affirming a suppression order vacated when it was unclear whether judgment rested on state or federal constitutional grounds). However, the Supreme Court of Pennsylvania has merely denied extraordinary and discretionary relief without indicating any opinion on appellants' constitutional challenge. Appellants are thus presumably free to pursue their challenge through state and federal actions still open to them. Under similar circumstances, where it was unclear whether the lower court denied relief on the merits or because the wrong remedy had been chosen, this court has dismissed the appeal or petition for certiorari. See, e.g., Phyle v Duffy, 334 US 431, 92 L Ed 1494, 68 S Ct 1131 (1948); Woods v Nierstheimer, 328 US 211, 90 L Ed 1177, 66 S Ct 996 (1946); White v Ragen, 324 US 760, 89 L Ed 1348, 65 S Ct 978 (1945). I would do that here unless appellants carry their burden of establishing that the decision of the Supreme Court of Pennsylvania did *not* rest on an adequate state ground.

EXHIBIT 2.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 384 Misc. Docket 21

Petition for Writ of Mandamus and Prohibition
Petition for Plenary Jurisdiction
Petition for Expedited Hearing

PHILADELPHIA NEWSPAPERS, INC., The Associated Press, Central States Publishing Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and the Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter,

Petitioners

v.

THE HONORABLE DOMENIC D. JEROME, Judge of the Court of Common Pleas of Delaware County, Pennsylvania.

No. 399 Misc. Docket 21

Petition for Writ of Mandamus and Prohibition
Petition for Assumption of Plenary Jurisdiction

EQUITABLE PUBLISHING COMPANY, INC., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors,

v. *Petitioners,*

THE HONORABLE ROBERT W. HONEYMAN, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

No. 400 Misc. Docket 21

Petition for Review in Nature of Prohibition
Application for Assumption of Plenary Jurisdiction

MONTGOMERY PUBLISHING COMPANY,

v. *Petitioner,*

THE HONORABLE ROBERT W. HONEYMAN, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

No. 401 Misc. Docket 21

Application for Assumption of Plenary Jurisdiction

MONTGOMERY PUBLISHING COMPANY,

v. *Petitioner,*

THE HONORABLE ROBERT W. HONEYMAN, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

No. 406 Misc. Docket 21

Petition for Writ of Mandamus and Prohibition
Petition for Assumption of Plenary Jurisdiction

EQUITABLE PUBLISHING COMPANY, INC., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors,

Petitioners,

v.

THE HONORABLE LAWRENCE A. BROWN, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

No. 407 Misc. Docket 21

Petition for Review in Nature of Prohibition
Application for Assumption of Plenary Jurisdiction

MONTGOMERY PUBLISHING COMPANY,

Petitioners,

v.

THE HONORABLE LAWRENCE A. BROWN, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

OPINION OF THE COURT

Filed: April 28, 1978

ROBERTS, *J.*

Petitioner newspapers [1] filed in this Court petitions for writs of mandamus and prohibition and for extraordinary relief, challenging the constitutionality of orders issued by respondent judges, upon the request of defendants in three criminal proceedings, pursuant to the Pennsylvania Rules of Criminal Procedure.[2] Petitioners contended that these

1. Petitioner newspapers include Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and the Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter (collectively referred to as "Philadelphia Newspapers"); Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors and Montgomery Publishing Company (collectively referred to as "Equitable Publishing").

Respondent judges include: The Honorable Domenic D. Jerome, Court of Common Pleas of Delaware County and the presiding judge over pre-trial motions in *Commonwealth v. Boyle*, Nos. 650-A, 650-B, and 650-C, Washington County, March Session, 1974; The Honorable Robert W. Honeyman, Court of Common Pleas of Montgomery County and presiding judge over pre-trial motions in *Commonwealth v. Palmer*, No. 149-77, Montgomery County; and The Honorable Lawrence A. Brown, Court of Common Pleas of Montgomery County and presiding judge over pre-trial motions in *Commonwealth v. Phillips*, No. 5060-76, Montgomery County. Philadelphia Newspapers challenged the orders of Judge Jerome; Equitable Publishing challenged the orders of Judges Honeyman and Brown.

2. We considered the petitions pursuant to the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P. L. 673, art. II, §§ 201(2) and 205, 17 P. S. §§ 211.201(2) and 211.205 (Supp. 1977). Section 201(2) provides:

> *"Original jurisdiction*
>
> The Supreme Court shall have original but not exclusive jurisdiction of:
>
> . . .
>
> (2) All cases of mandamus or prohibition to courts of inferior jurisdiction. . . ."

orders, limiting public access to pre-trial hearings on motions to suppress evidence, denied their right of access to judicial proceedings. We concluded that petitioners failed to demonstrate that the orders denied them clear rights and therefore denied the petitions.

I. Procedural History

In *Commonwealth v. Boyle,* Nos. 650-A, 650-B, and 650-C, Washington County, March Session, 1974, the defendant Boyle was accused of ordering the death of United Mineworkers union official Joseph Yablonski, a crime which received massive national publicity. On January 24, 1974, we granted Boyle's request to change venue from Washington County because of extensive publicity concerning the crime.[3] In *Commonwealth v. Palmer,* No. 149-77, Montgomery County, the defendant, a police officer, was accused of kidnapping and killing a Montgomery County citizen. Petitioner Equitable Publishing averred in its petition that the proceedings were "of the highest public interest and concern in Montgomery County."[4] In *Commonwealth v. Phillips* No. 5060-76, Montgomery County, the defendant was accused of mur-

2. (Cont'd.)
Section 205 provides:

"*Extraordinary jurisdiction*

Notwithstanding any other provisions of law, The Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or justice of the peace of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done."

3. This Court reversed Boyle's earlier conviction because he was denied an opportunity to present exculpatory evidence. *Commonwealth v. Boyle,* 470 Pa. 343, 368 A. 2d 661 (1977).

4. In acting upon these petitions, we accepted these averments as true. See *Allstate Insurance Co. v. Fioravanti,* 451 Pa. 108, 299 A. 2d 585 (1973).

dering a Montgomery County police officer. Equitable Publishing characterized these proceedings as attracting similar public interest.

Each defendant filed a pre-trial motion to suppress evidence in accordance with the Pennsylvania Rules of Criminal Procedure, Pa. R. Crim. P. 323(a), providing for a pre-trial hearing to determine the admissibility of evidence defendants claim has been obtained in violation of their constitutional rights.[5] Each defendant requested the trial court to exercise its authority, pursuant to Pa. R. Crim. P. 323(f), 323(g), 326, and 327,[6] to enter special orders closing the pre-trial hearing to the public, sealing the record of these pre-trial proceedings, and prohibiting participants in these proceedings from discussing, disclosing, or disseminating evidence "the admissibiilty of which may have to be determined by the Court." Respondent Judge Jerome entered the requested order in *Boyle.*[7] Re-

5. Pa. R. Crim. P. 323(a) provides:

"*Suppression of Evidence*

(a) The defendant or his attorney may make application to the court to suppress any evidence alleged to have been obtained in violation of the defendant's constitutional rights."

6. See infra text at Part III, slip opinion at 10-11.

7. Upon filing applications to suppress evidence pursuant to Rule 323(a), defendant Boyle moved to close the suppression hearings under Rule 323(f) & (g) and under 326 and 327 to limit public comment by parties, witnesses and attorneys on the evidence sought to be suppressed.

Philadelphia Newspapers averred that on March 28, 1977 the court prohibited "parties, attorneys, investigators, judicial officers, state and federal public officials, and prospective witnesses from discussing or commenting upon any proposed evidence or disseminating any documents, the admissibility of which may have to be determined by the Court;" on May 2, 1977, directed the press and public out of the courtroom while pre-trial motions were heard; and ordered sealed all papers related to the pre-trial proceedings.

Where a defendant moves to close a suppression hearing and to restrain participants from public comment thereon, an order

spondents Judges Honeyman and Brown entered the requested orders in *Palmer* and *Phillips*, respectively.[8]

On May 3, 1977, one day after pre-trial suppression proceedings in *Commonwealth v. Boyle* began, Philadelphia Newspapers filed a petition to vacate the orders of respondent Judge Jerome, and a request to stay the pre-trial proceedings. Judge Jerome declined to rule on the petition to vacate the orders until completion of the pre-trial proceedings and refused the stay. One day later, Philadelphia Newspapers filed in this Court its petitions for writs of mandamus and prohibition and for extraordinary relief, requesting this Court to direct Judge Jerome to hold the suppression hearing open to the public and provide other appropriate relief, including a stay of all proceedings. On May 9, 1977, Judge Jerome again declined to rule on the petition, believing he lacked juris-

7. (Cont'd.)
such as this one prohibiting participants from "discussing or commenting upon any proposed evidence or disseminating any documents, the admissibility of which may have to be determined by the Court" is the proper order to enter under Rules 326 and 327.

8. Equitable Publishing averred that on May 2, 1977, the court prohibited "parties, attorneys, police officers, court personnel, prison personnel, and personnel of the sheriff's office from discussing or commenting about [*Commonwealth v. Palmer*]"; directed the press and public out of the courtroom during pre-trial proceedings; and sealed the record of these proceedings.

Equitable Publishing also averred that on May 9, 1977, the court prohibited "parties, attorneys, police officers, court personnel, prison personnel, personnel of the sheriff's office, and prospective witnesses from making or authorizing statements out of court relating to *Commonwealth v. Phillips*. Equitable Publishing also averred that Judge Brown ordered the press and public out of the courtroom, and directed that the record and proceedings be sealed.

On the record presented here, we believe that the orders in *Palmer* and *Phillips* had essentially the same scope as the order in *Boyle*, supra note 7.

Respondents invoked Rules 326 and 327 only to ensure that parties to suppression hearings closed under 323 would not release pre-trial prejudicial information. We therefore were not faced with a case in which Rules 326 and 327 were used for any other purpose.

diction over the controversy once petitioner sought special relief in this Court. On May 23, 1977, we denied the requested relief.

Equitable Publishing, on May 12, 1977, filed with the trial court a motion to vacate the orders of Judge Honeyman in *Commonwealth v. Palmer*. Judge Honeyman did not act upon the motion until May 24. Judge Honeyman denied the motion on the basis that the newspapers were without standing to intervene in the criminal proceedings. On May 26, Equitable Publishing filed its petitions for special relief in this Court, requesting the same relief as Philadelphia Newspapers did from the orders in *Commonwealth v. Boyle*.[9] Equitable Publishing averred here that the suppression hearing record had been unavailable only until May 20, 1977, when Palmer's trial ended.[10] We denied relief on June 20, 1977.

On May 12, 1977, Equitable Publishing filed a motion to vacate the orders of Judge Brown in *Commonwealth v. Phillips*. Judge Brown did not rule upon the motion until June 2, 1977, when he dismissed the motions for the same reason as Judge Honeyman. Equitable Publishing filed its petitions for special relief in this Court on June 7, requesting the same relief it sought from the orders in *Commonwealth v. Palmer*. On June 20, 1977, we denied relief.

Petitioners appealed from the orders of this Court to the Supreme Court of the United States. On January 9, 1978, the Court, per curiam, concluded that the record did not indicate whether we "passed on [petitioners'] federal claims" or whether we denied special relief "on an ade-

9. Equitable Publishing and Montgomery Publishing did not expressly request this Court to stay the pre-trial proceedings in *Commonwealth v. Palmer*.

10. See *United States v. Cianfrani*, — F. 2d — (3d Cir., filed March 16, 1978) (tapes defendant sought to suppress must be made public after defendant has pleaded guilty); Pa. R. Crim. P. 323(g).

quate and independent state ground." The Court therefore vacated our orders denying special relief and "remand[ed] the cause to [this C]ourt for such further proceedings as [we] may deem appropriate to clarify the record. See *California v. Krivda*, 409 U. S. 33 (1972)." Mr. Justice Rehnquist, joined by Mr. Justice Stephens, filed a dissenting opinion. On February 9, 1978, this Court received the official mandate of the Supreme Court. Accordingly, we file this opinion.

II. State Remedies Requested by Petitioner Newspapers

Petitioners sought writs of prohibition and mandamus from this Court.[11] Prohibition and mandamus both require a party seeking relief to establish a violation of clear rights not remediable by ordinary processes. This requirement ensures that only the most meritorious claims will require this Court to depart from its normal appellate function and consider an original proceeding. Petitioners failed to establish their entitlement to these extraordinary remedies because they did not present a showing that the orders of respondents, entered pursuant to the Pennsylvania Rules of Criminal Procedures, denied clear rights of petitioners. We therefore denied the petitions.

We first discuss the nature of Pa. R. Crim. P. 323(f) & (g), 326, and 327, pursuant to which the challenged orders were issued. We then discuss petitioners' asserted right of access to pre-trial judicial proceedings and the circumstances in which this right may be temporarily limited in order to protect constitutional rights of individuals and important interests of the public. We next discuss the nature of the right of defendants to trial by an impartial jury and the interest of the Commonwealth and its citizens in the prompt and fair disposition of criminal litigation, both of which are protected by Rules 323, 326, and 327. Finally, we set forth why on these records the Rules of Criminal Procedure may permissibly be applied in these cases to enforce constitutional rights of the accused and promote public interests.

11. Prohibition is an extraordinary writ designed to assure regularity in judicial proceedings by preventing unlawful exercise or abuse of jurisdiction. *In re Reyes*, — Pa. —, 381 A. 2d 865 (1977); *Pirillo v. Takiff*, 462 Pa. 511, 341 A. 2d 896 (1975); *Carpentertown Coal and Coke Co. v. Laird*, 360 Pa. 94, 61 A. 2d 426 (1948); *McNair's Petition*, 324 Pa. 48, 187 A. 498 (1936). "Its function is to restrain or prohibit an offending court from continuing its unwarranted conduct when continuation threatens imminent harm to the individual on whose behalf the writ is issued." Comment, "The Writ of Prohibition in Pennsylvania," 80 Dick. L. Rev. 472, 472-73 (1976) (footnotes omitted).

While prohibition prevents action, mandamus compels it. *Carpentertown Coal and Coke Co. v. Laird*, supra. Like prohibition, mandamus is an extraordinary writ of the common law, designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy. *Princeton Sportswear Corp. v. Redevelopment Authority*, 460 Pa. 274, 333 A. 2d 473 (1975); *Valley Forge Racing Ass'n. v. State Harness Racing Comm'n.*, 449 Pa. 292, 297 A. 2d 823 (1972). A court issuing a writ of mandamus may direct the exercise of discretion, but not performance of a particular discretionary act. *Taylor v. Abernathy*, 422 Pa. 629, 222 A. 2d 863 (1966); *Mellinger v. Kuhn*, 388 Pa. 83, 130 A. 2d 154 (1957).

Petitioners also requested this Court to invoke its extraordinary jurisdiction because of the asserted immediate public importance of the issues. See supra note 2; *Wilson v. Blake*, — Pa. —, 381 A. 2d 450 (1977) (plenary jurisdiction exercised to determine right of criminal defendant under Pa. R. Crim. P. 141(c)(4) to make tape recording of preliminary hearing); *Citizens Committee v. Board of Elections*, 470 Pa. 1, 367 A. 2d 232 (1977) (plenary jurisdiction invoked to decide constitutionality of procedures by which Mayor of Philadelphia was to be recalled from office). The presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief. As in requests for writs of prohibition and mandamus, we will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner's rights. Even a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief. See *Illinois v. City of Milwaukee*, 406 U. S. 91, 92 S. Ct. 1385 (1972).

III. The Pennsylvania Rules of Criminal Procedure and Their Objectives

The Pennsylvania Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding," Pa. R. Crim. P. 2, and "secure simplicity in procedure, fairness in administration and the elimination of unjustified expense and delay . . . ." Id. This comprehensive set of statewide Rules assists in the fair, prompt, orderly, and uniform resolution of recurring problems in the administration of our state system of criminal justice.[12]

The Rules upon which the challenged orders were based serve an important function in this scheme by avoiding premature disclosure of information which would jeopardize the right of an accused to an impartial jury. Pa. R. Crim. P. 323(f)&(g) provides:

> *"Suppression of Evidence*
>
> * * *
>
> (f) The hearing, either before or at trial, shall be held in open court unless defendant, by his counsel, moves that it be held in the presence of only the defendant, counsel for the parties, court officers and necessary witnesses. In any event, the hearing shall be held outside the hearing and presence of the jury. In all cases the court may make such order concerning

12. Our Rules of Criminal Procedure are a system designed to give effective protection to the rights of defendants and maintain the integrity and stability of our state system of criminal justice. For example, Pa. R. Crim. P. 1100 protects the guarantee of a speedy trial by requiring, subject to carefully drawn exceptions, that an accused be brought to trial within 180 days of the initiation of criminal proceedings against him. Compare *Barker v. Wingo*, 407 U. S. 514, 92 S. Ct. 2183 (1972) (providing for ad hoc approach to speedy trial claims). See also, e.g., Pa. R. Crim. P. 319 (ensuring knowing and voluntary pleas of guilty); Pa. R. Crim. P. 1101 (knowing and voluntary waiver of right to trial by jury).

> publicity of the proceedings as it deems appropriate under [Pa. R. Crim. P.] 326 and 327.
>
> (g) A record shall be made of all evidence adduced at the hearing. The clerk of court shall impound the record and the nature and purpose of the hearing and the order disposing of the application shall not be disclosed by anyone to anyone except to the defendant and counsel for the parties. The record shall remain thus impounded unless the interests of justice require its disclosure."

Pa. R. Crim. P. 326 provides:

> *"Special Orders Governing Widely-Publicized Or Sensational Cases*
>
> In a widely-publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order. In such cases it may be appropriate for the court to consult with representatives of the news media concerning the issuance of such a special order."

Pa. R. Crim. P. 327 provides:

> *"Public Discussion of Pending or Imminent Criminal Litigation by Court Personnel*
>
> All court personnel including, among others, court clerks, bailiffs, tipstaffs and court stenographers

are prohibited from disclosing to any person, without authorization by the court, information relating to a pending criminal case that is not part of the public records of the court. This rule specifically prohibits the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public."

At a suppression hearing, the accused challenges the admissibility of inculpatory statements, alleged instruments of crime and alleged fruits of crime on grounds that the Commonwealth has obtained such evidence through violation of constitutional or other rights of the accused. Commonwealth witnesses, including police officers, may testify about the crime, and the involvement and behavior of the accused, or his prior criminal record. The accused may choose to testify or present witnesses to challenge the Commonwealth's evidence. Thus, Rules 323, 326 and 327 provide the trial court with a method for avoiding pretrial exposure of potential jurors to evidence challenged at suppression hearings, thus eliminating a substantial impediment to selection of an unbiased jury.

These Rules also ensure that a defendant's right to have unconstitutionally seized evidence suppressed will not be chilled by fear that information becoming public at a suppression hearing will make an impartial jury difficult or impossible to select. Cf. *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209 (1968) (government may not use fear of death penalty to dissuade defendants from asserting right to jury trial); *Garrity v. New Jersey,* 385 U. S. 493, 87 S. Ct. 616 (1967) (prosecution cannot use statements obtained from policemen threatened with discharge if they refused to testify); see generally *Sheppard v. Maxwell,* 384 U. S. 333, 86 S. Ct. 1507 (1966).[13]

13. The Supreme Court in *Sheppard v. Maxwell,* 384 U. S. 333, 86 S. Ct. 1507 (1966), found that the "carnival atmosphere"

These Rules are designed to promote the clear public interest in having persons accused of crime tried fairly, expediously, economically, and only once. If prejudicial publicity occurs, the trial court may have to continue the case, change venue, resort to extensive voir dire to assure that the attitudes of jurors have not been influenced by disclosure, or use the costly and inconvenient device of jury sequestration. See *Simmons v. United States,* 390 U. S. 377, 88 S. Ct. 966 (1968); *Jackson v. Denno,* 378 U. S. 368, 84 S. Ct. 1774 (1964). If the trial court takes inadequate remedial measures, an appellate court would be compelled to reverse a conviction, starting the trial process anew.

Essential to the stability and efficiency of our state court system is the requirement that our trial courts control court calendars. See ABA Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge § 3.8 (Approved Draft, 1972); Standards Relating to Speedy Trial Part I (Approved Draft, 1968). Without Rules 323, 326, and 327, the time and place for trial in this kind of case would in reality be fixed not by courts, but by the timing and degree of premature disclosures of information from suppression hearings. Thus, the Rules, temporarily precluding disclosure of such information wherever necessary, maintain in the courts control over court calendars, assuring uniformity and evenhanded enforcement of criminal justice.

13. (Cont'd.)
resulting from press coverage of the crime and the trial denied the accused a fair trial. Concluding that such an atmosphere "could easily have been avoided since the courtroom and the court house premises are subject to the control of the court," id. at 358, 86 S. Ct. at 1507, the Court imposed a duty upon courts to ensure that an accused is tried by a jury not subjected to prejudicial information. Our Rules of Criminal Procedure are in harmony with the principles announced in *Sheppard.*

IV. Free Press and the Limited Right of Access to Pre-Trial Suppression Hearings

Petitioners argued that the Constitutions of the United States and Pennsylvania afford the public a right to have open judicial proceedings, including pre-trial motions to suppress. They contended that respondents' orders denied them this right.

Petitioners incorrectly characterize respondents' orders limiting public access to pre-trial suppression hearings deciding the admissibility of evidence in criminal proceedings as "prior restraints." A prior restraint prevents publication of information or material in the possession of the press and is presumed unconstitional. See *Oklahoma Publishing Co. v. District Court*, 430 U. S. 308, 97 S. Ct. 1045 (1977) (when press obtained name and photo of juvenile court could not prohibit publication); *Nebraska Press Ass'n v. Stuart*, 427 U. S. 539, 96 S. Ct. 2791 (1976) (striking down order prohibiting publication of inculpatory statements and facts obtained by press).[14] These orders, however, issued in compliance with the Rules of Criminal Procedure, did not prevent petitioners from publishing any information in their possession or from writing whatever they pleased and therefore did not constitute a prior restraint upon publication.[15]

The distinction between restraints upon the content of publication and limitations upon access is well estab-

14. Accord, *New York Times Co. v. United States*, 403 U. S. 713, 91 S. Ct. 2140 (1971) (government could not enjoin publication of secret documents allegedly imperilling national security obtained by press clandestinely); *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625 (1931) (state may not enjoin publication of "scurrilous" anti-semitic material held by press).

15. Respondents had no authority to impose sanctions on petitioner after publication of any confidential material they might obtain, nor did they attempt to do so. Cf. *Cox Broadcasting Co. v. Cohn*, 420 U. S. 469, 95 S. Ct. 1029 (1975) (invalidating civil penalties for publication of public judicial records).

lished. For example, in *Pell v. Procunier*, 417 U. S. 817, 94 S. Ct. 2800 (1974), the Court upheld prison regulations restricting press interviews with prisoners, but noted that the regulations did not prohibit publication of any material the press obtained. By contrast, in *New York Times Co. v. United States*, 403 U. S. 713, 91 S. Ct. 2140 (1971), the Court prohibited the government from enjoining publication of military documents in the hands of the press, but did not suggest that the government lacked the right to restrict access to them by classification.[16]

The Supreme Court of the United States has held that restrictions may be placed upon access of the public and the press to certain information when the restrictions protect constitutional interests. *McMullan v. Wohlgemuth*, 415 U. S. 970, 94 S. Ct. 1547 (1974), dismissing for want of a substantial federal question, 453 Pa. 147, 308 A. 2d 888 (1973) (press access properly restricted by state regulations protecting privacy of welfare recipients); see *Sunbeam Television Corp. v. Shevin*, No. 77-1056, 46 U. S. L. W. 3585 (March 21, 1978), dismissing for want of a substantial federal question, 351 S. 2d 723 (Fla. 1977) (upholding state law forbidding reporters from invading privacy by secretly taping interviews).[17] This rule applies

16. The basis of the distinction may be that direct restraints upon expression impose restrictions on human thought and strike at the core of liberty in a way which limitations on access to information do not. See generally Emerson, The System of Freedom of Expression (1970).

17. See generally, Comment, Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505 (1974); Note, The First Amendment and the Public Right to Information, 35 U. Pitt. L. Rev. 93 (1973); Comment, Right of the Press to Gather Information, 71 Colum. L. Rev. 838 (1971).

The Supreme Court has also held that certain valid governmental interests may be promoted by limiting public access to sources of information. *Pell v. Procunier*, 417 U. S. 817, 94 S. Ct. 2800 (1974) (prison regulations may prohibit interviews with particular prisoners); *Zemel v. Rus*, 381 U. S. 1, 85 S. Ct. 1272

the principle that government may, when necessary, protect personal liberties even where enforcement of those liberties may subordinate in limited instances the constitutional interests of others. For example, in *Runyon v. McCrary*, 427 U. S. 160, 96 S. Ct. 2586 (1976), the Supreme Court held that the 13th and 14th amendments empowered Congress to require private schools to desegregate even though desegregation deprived some citizens of the ability to associate for education in the manner they chose. Similarly, in *Walz v. Tax Commission*, 397 U. S. 664, 90 S. Ct. 1409 (1970), the Court upheld tax exemptions for religious institutions as promoting freedom of religion despite the claim that the exemptions violated the establishment clause. Likewise, the state may recognize property interests in intellectual or artistic creations by prohibiting their publication or broadcast without permission. See Copyright Act, 17 U. S. C. §§ 101 et seq.; *Zacchini v. Scripps-Howard Broadcasting Co.*, — U. S. —, —, 97 S. Ct. 2849, 2857 (1977) (citing cases).

The public undoubtedly has a strong interest in the judicial process. "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U. S. 367, 374, 67 S. Ct. 1249, 1254 (1947); see *In re Oliver*, 333 U. S. 257, 68 S. Ct. 499 (1948) (need for public trial to protect defendant). The Supreme Court of the United States has suggested that the public's interest in judicial proceedings is constitutionally protected by the

17. (Cont'd.)
(1965) (State Department may restrict reporter foreign travel); *Holden v. Minnesota*, 137 U. S. 483, 491, 11 S. Ct. 143, 146 (1890) (per Harlan, J.) (statute upheld excluding reporters from scene of execution despite request by condemned man); accord, *McLaughlin v. Philadelphia Newspapers, Inc.*, 465 Pa. 104, 348 A. 2d 376 (1975) (records attorney disciplinary hearing may be closed); *Philadelphia Newspapers, Inc. Disciplinary Board*, 468 Pa. 382, 363 A. 2d 779 (1976); see generally, L. Tribe, American Constitutional Law §§ 12-11, 12-19 (1978).

sixth amendment right of the accused to a public trial. *Singer v. United States*, 380 U. S. 24, 85 S. Ct. 783 (1965) (dictum); see *United States v. Cianfrani*, — F. 2d — (3d Cir., filed March 16, 1978); Pa. Const. art. I, § 11.[18] The press serves the important function of informing the public of these public proceedings. *Sheppard v. Maxwell*, supra; see generally ABA Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Approved Draft, 1968).[19]

But the Supreme Court has never held that the first or sixth amendments create an absolute right of access to every court proceedings or to all information in the possession of the government or the courts. See *Nebraska Press Ass'n v. Stuart*, supra; *Pell v. Procunier*, supra; *Branzburg v. Hayes*, 408 U. S. 665, 92 S. Ct. 2646 (1972). Both the *Nebraska Press* majority and the concurring opinion of Mr. Justice Brennan recognize that restrictions on access to pre-trial proceedings are different from restraints on the right to publish information available to the public. Supra at — n. 8, — & — n. 27, 96 S. Ct. at 2805 n. 8, 2822-23 & 2823 n. 27; see *Sheppard v. Maxwell*, 384 U. S. 333, 360-61, 86 S. Ct. 1507, 1521 (1966) (suggesting restraints on access to prevent prejudicial disclosure). In *Oklahoma Publish-*

18. A few federal courts of appeals have allowed certain parts of trials to be kept secret. L. Tribe, American Constitutional Law § 12-11 at 629 n. 28 (citing cases). Similarly, courts-martial operate under rules different from those governing civilian trials. See generally *Middendorf v. Henry*, 425 U. S. 25, 96 S. Ct. 1281 (1976).

19. A few courts have held that the Constitution grants the press access to judicial proceedings. See *CBS, Inc. v. Young*, 522 F. 2d 234, 239 (6th Cir. 1975) (civil trial); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N. E. 2d 127 (Ohio 1976) (suppression hearings); see also *United States v. Cianfrani*, — F. 2d — (3d Cir., filed March 16, 1978) (panel) (modifying part of district court order closing pre-trial proceedings where defendant challenged admissibility of intercepted statements; court pointed out that, because defendant pleaded guilty following hearing, case did not present fair trial issue).

ing, the Court emphasized that *Nebraska Press* was aimed only at eliminating prior restraints directly prohibiting publication of information and not at any other measures protecting fair trials.

We believe that any limitation on access should be carefully drawn. First, the right of access to court proceedings should not be limited to any reason less than the compelling state obligation to protect constitutional rights of criminal defendants and the public interest in the fair orderly, prompt, and final disposition of criminal proceedings.[20] Second, access should not be limited unless the threat posed to the protected interest is serious.[21] Third, rules or orders limiting access should effectively prevent the harms at which they are aimed.[22] Finally, the rules or

20. Compare *Central South Carolina Chapter v. Martin*, 556 F. 2d 706 (4th Cir. 1977), cert. denied, — U. S. —, — S. Ct. — (1978) (participants may be ordered not to discuss proceedings in order to protect defendant's right to fair trial), and *Gannett Co. v. DePasquale*, 22 Crim. L. Rptr. 2322 (N. Y. filed December 19, 1977) (suppression hearing may be closed to protect right of defendant to an impartial jury), with *Chase v. Robson*, 435 F. 2d 1059 (7th Cir. 1970) (court may not, over opposition of defendant, restrain defense and prosecuting attorneys from public comment on case). Cf. *Runyon v. McCrary*, supra (Congress may enforce thirteenth and fourteenth amendment rights of citizens in ways which limit associational rights of others). See generally *CBS, Inc. v. Young*, 522 F. 2d 234 (6th Cir. 1975) (all pre-trial proceedings may not be closed in civil case where no threat to constitutional rights of litigants shown).

21. Cf., e.g., *Erznoznik v. City of Jacksonville*, 422 U. S. 205, 95 S. Ct. 2268 (1975) (passers-by offended by movies shown at drive-in theatre free to look the other way); *Cohen v. California*, 403 U. S. 15, 91 S. Ct. 1780 (1971) (minor threat to sensibilities of onlookers cannot justify punishment for wearing assertedly offensive message on jacket in public place).

22. Cf. *Moore v. City of East Cleveland*, — U. S. —, — n. 7, 97 S. Ct. 1932, 1936 n. 7 (1977) (statute infringing right of family to live together overturned where ineffective at accomplishing its primary purpose of reducing overcrowding of town); *USDA v. Moreno*, 413 U. S. 528, 536-38, 93 S. Ct. 2821, 2826-27 (1973) (statute infringing right of association overturned where ineffective at accomplishing its stated purpose of ferreting out food stamp fraud).

orders should limit no more than is necessary to accomplish the end sought.[23] Because the challenged Rules and orders are closely tailored to protecting both the constitutional right of defendants to a fair trial and the public's interest in the fair and efficient administration of criminal justice, we denied relief.

V.

A. *The Challenged Rules and Orders Advance The Public Interest In A Fair and Prompt Criminal Trial.*

The Rules and orders petitioners challenge are designed to protect the right of an accused to trial by an impartial jury. No right is more fundamental to the American system of justice. U. S. Const. amend. VI; Pa. Const. art. I, § 9; *Gardner v. Florida*, — U. S. — , 97 S. Ct. 1197 (1977); *Nebraska Press Ass'n v. Stuart*, supra; *Ham v. South Carolina*, 409 U. S. 524, 93 S. Ct. 848 (1973); *Peters v. Kiff*, 407 U. S. 493, 92 S. Ct. 2163 (1972); *Duncan v. Louisiana*, 391 U. S. 145, 88 S. Ct. 824 (1967); *Turner v. Louisiana*, 379 U. S. 466, 85 S. Ct. 546 (1965).

Without a proper method for dealing with extensive publicity concerning a crime, a judicial system runs the serious risk that the jury will reach its verdict based on evidence from sources outside of the courtroom, contrary to the demands of due process. See *Turner v. Louisiana*,

23. See *Nebraska Press Ass'n v. Stuart*, supra at —, —, —, 96 S. Ct. at 2805, 2808, 2822-23 (Opinion of the Court per Burger, C. J.; Powell, J., concurring; Brennan, J., joined by Stewart and Marshall, JJ., concurring). Compare, e.g., *Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666 (1938) (ban on circulating handbills voided as too burdensome even though the ordinance challenged did not purport to regulate the content of ideas propagated), and *Saia v. New York*, 334 U. S. 558, 68 S. Ct. 1148 (striking down ban on loudspeakers providing police unfettered discretion to make exceptions), with *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900 (1940) (parade permit requirement tied to need for public order), and *Kovacs v. Cooper*, 336 U. S. 77, 69 S. Ct. 448 (1949) (upholding ordinance forbidding only raucous loudspeakers).

supra; *Irvin v. Dowd,* 366 U. S. 717, 81 S. Ct. 1639 (1961); *Commonwealth v. Bruno,* 466 Pa. 245, 352 A. 2d 40 (1976); *Comonwealth v. Pierce* 451 Pa. 190, 303 A. 2d 209, cert. denied, 414 U. S. 878, 94 S. Ct. 164 (1973).[24] As Justice Clark, speaking for the Court in *Sheppard v. Maxwell,* supra at 350-51, 86 S. Ct. at 1516, observed:

> "'[L]egal trials are not like elections to be won through the use of the meetinghall, the radio, and the newspaper.' Bridges v. California, 314 U. S. 252, 271, 62 S.Ct. 190, 197 (1941). And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.' Chambers v. Florida, 309 U. S. 227, 236-37, 60 S. Ct. 472, 477 (1940). 'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' Pennekamp v. Florida, 328 U. S. 331, 56 S. Ct. 1029 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources."

The most damaging of all information from outside the courtroom comes from the pre-trial suppression hearing. A trial court's ability to afford the accused a fair trial is substantially threatened where challenged inculpatory

24. See *Commonwealth v. Gilman,* 470 Pa. 179, 368 A. 2d 253 (1977) (prosecutor's closing remarks must be facts in evidence and legitimate inferences therefrom); *Commonwealth v. Revty,* 448 Pa. 512, 295 A. 2d 300 (1972) (same).

statements,[25] testimony of the accused bearing on such statements,[26] or other information considered at the suppression hearing becomes public knowledge prematurely. See *Rideau v. Louisiana,* 373 U. S. 723, 83 S. Ct. 1417 (1963) (trial court erred in denying change of venue where accused's statement to police had been televised repeatedly in the area from which the jurors were drawn); *Commonwealth v. Bruno, supra* (conviction reversed where trial court failed to question jurors concerning their exposure to publicized, suppressed confession); *Commonwealth v. Pierce,* supra (conviction reversed and venue changed where news accounts reported defendant's criminal record and confession to crime); see also *Marshall v. United States,* 360 U. S. 310, 79 S. Ct. 1171 (1959) (conviction reversed where jurors read newspaper accounts detailing defendant's criminal record); *United States v. Williams,* 22 Crim. L. Rptr. 2521 (5th Cir. filed February 27, 1978) (conviction reversed where jurors observed television broadcast concerning defendant's previous conviction). Our Rules are designed to give defendants such as Boyle, Palmer, and Phillips, all charged with murder for crimes generating substantial public attention, the opportunity to be tried, like any other persons accused of crime, on the basis of facts presented at trial.

Further, without proper means for temporarily limiting access to suppression hearings, defendants may be pressured into foregoing their right to challenge the manner in which police obtained inculpatory evidence. A defendant may feel compelled to give up this right out of fear that inculpatory evidence might become public knowl-

25. See *Jackson v. Denno,* 378 U. S. 368, 84 S. Ct. 1774 (1964); *Commonwealth v. Pierce,* supra; *Commonwealth ex rel. Gaito v. Maroney,* 422 Pa. 171, 220 A. 2d 628 (1966).

26. See *Simmons v. United States,* 390 U. S. 377, 88 S. Ct. 966 (1968).

edge before or during trial. Such pressure to forego a constitutional right denies due process. *E.g., United States v. Jackson,* 390 U. S. 570, 88 S. Ct. 1209 (1968) (suspect denied due process by being required to waive jury trial to avoid death penalty). Even a defendant who chooses to risk such disclosure might be reluctant to testify or present favorable witnesses out of a similar fear of disclosure. The Rules serve to avoid circumstances compelling an accused to forego these important rights.[27]

Prejudicial publicity from pre-trial suppression hearings injures the Commonwealth as well as the accused. Prejudicial disclosures may taint a trial or require a trial court to delay trial until publicity subsides. Neither delayed trials nor retrials present as favorable opportunities for establishing truth as timely first trials. By precluding prejudicial disclosures arising from pre-trial suppression hearings, the Rules promote the speedy and effective enforcement of the criminal laws, ensure swift convictions deterring crime, see A. von Hirsch, Doing Justice (1976), and avoid unnecessary expenditures of public funds and judicial resources.[28]

27. The danger that publicity may deter the accused from exercising his right to suppress evidence and hamper the ability of our state system of criminal justice to afford the accused a fair trial is serious and continuing. Justice Frankfurter observed:

> "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court."

Irvin v. Dowd, 366 U. S. 717, 729, 81 S. Ct. 1639, 1646 (Frankfurter, J., concurring).

28. Indeed, the Commonwealth agreed to each defendant's request for special orders in these cases of widespread interest.

Significantly, the orders here challenged were requested by the defendants. Rule 323(f), upon which the orders were based, provides that only a defendant may request a closed suppression hearing to protect his constitutional rights. See *Commonwealth v. Bennett,* 445 Pa. 8, 11-12 n. 3, 282 A. 2d 276, 278 n. 3 (1971), following *United States ex rel. Bennett v. Rundle,* 419 F. 2d 599 (3rd Cir. 1969) (court's sua sponte closure of suppression hearing violated defendant's right to public trial). This provision denies the prosecution the power to prevent disclosure of information concerning a criminal case, "gag" participants in the proceeding, or deprive an accused his right to open judicial proceedings. See note 8 supra (use of Rules 326 & 327).

Cases from federal courts of appeals demonstrate the importance of focusing on the defendant's protection of his constitutional rights. In *Chase v. Robson,* 435 F. 2d 1059 (7th Cir. 1970), the seventh circuit invalidated an order opposed by the defendants forbidding the defendants and attorneys for both prosecution and defense from publicly commenting on the case. See *In re Oliver,* 452 F. 2d 111 (7th Cir. 1971). The order in *Chase* also covered all information about the case, whereas the challenged orders here involve only pre-trial suppression hearings, generating information most likely to be extremely prejudicial to the accused. See notes 7 & 8 supra. Similarly, in *Central South Carolina Chapter v. Martin,* 556 F. 2d 706 (4th Cir. 1977), cert. denied, — U. S. —, — S. Ct. — (1978), the fourth circuit, while it approved a ban on pre-trial discussion of prejudicial matters not of public record specifically noted the defendant was free to seek a modification of the order as it affected him.

Here, respondents entered orders in murder cases of great notoriety. In *Commonwealth v. Boyle,* the defend-

ant is a national figure, accused of a crime of widespread attention. Publicity in this case had already compelled this Court to grant a change of venue. In *Commonwealth v. Palmer* and *Commonwealth v. Phillips,* petitioners averred that the crimes were also of widespread interest in the community. Thus, the challenged orders were aimed at averting a substantial threat to both the fundamental rights of the defendants and the public interest in prompt and orderly administration of criminal justice.

B. *The Orders Imposed Only a Limitation on Access to Pre-trial Suppression Hearings, Carefully Designed to Protect Rights of The Accused and Interests of The Public.*

The orders here are limited to pre-trial suppression hearings, which involve materials likely to be prejudicial to defendants. See supra notes 6-8 and accompanying text. In *Central South Carolina Chapter v. Martin,* supra, the fourth circuit demonstrated the significance of avoiding pre-trial disclosure of prejudicial information. The court invalidated parts of a pre-trial order prohibiting parties from mingling with the press on sidewalks adjacent to the courthouse and barring artists from sketching jurors, but upheld that part of the order prohibiting extrajudicial statements of participants "which might divulge extrajudicial matter not of public record." In *United States v. Gurney,* 558 F. 2d 1202 (5th Cir. 1977), cert. denied sub nom. *Miami Publishing Co. v. Krentzman,* No. 77-1010, New York Times, April 18, 1978, p. 14, col 4 (U. S.), the fifth circuit reaffirmed the well established rule that even during an open, public trial, a court may limit public access to sidebar and bench conferences. Cf. Tribe, supra note 18. The same jurisprudential considerations justifying the traditional sidebar rule support our Rules authorizing re-

spondents' pre-trial suppression hearing orders. Here, as in *Martin* and *Gurney,* the orders of respondents carefully preserve the integrity of juror deliberations.

United States v. Cianfrani, — F. 2d — (3 Cir. filed March 16, 1978), is not to the contrary. In *Cianfrani,* a panel of the third circuit modified part of a district court order closing a pre-trial hearing where the court determined the admissibility of intercepted statements and other evidence. After the pre-trial hearing, the defendant pleaded guilty. Thus, the panel was not presented with a case where such orders were necessary to preserve the defendant's right to a fair trial. Nor do we reach a conclusion contrary to *CBS, Inc. v. Young,* 522 F. 2d 234 (6th Cir. 1975), where the sixth circuit invalidated an order forbidding all participants and witnesses from discussing with the press any aspect of a celebrated civil suit. This order was not entered to protect the constitutional rights of any party, and restricted access to all information concerning the case not public, rather than to specific information likely to impede a fair trial.

Further, all three trials have been completed, and the challenged orders may have expired. See Rule 323(g); note 10 supra and accompanying text. The statute in *McMullan v. Wohlgemuth,* supra, permanently prevented agents of the state from revealing to the press and the public names of any Pennsylvania welfare recipients. This statute, more restrictive than the orders here, was upheld by our Court and the Supreme Court of the United States against an access challenge. 415 U. S. 970, 94 S. Ct. 1547 (1974), dismissing for want of a substantial federal question, 453 Pa. 147, 308 A. 2d 888 (1973). Similarly, in *Garrett v. Estelle,* 556 F. 2d 1274 (5th Cir. 1977), prison regulations permissibly denied newsmen the right to film executions for broadcast, depriving the public of certain

information about these events. See *Holden v. Minnesota*, 137 U. S. 483, 11 S. Ct. 143 (1890) (upholding statute excluding reporters from scene of execution despite request by condemned man). The challenged orders imposed only a limitation on access to pre-trial suppression hearings, no greater than necessary to accomplish their purpose. Accord, *United States v. Gurney*, supra (upholding district court order limiting access to side bar conferences).

Moreover, the Rules and orders here do not contain the inherent ambiguities and potential for chilling condemned in *Nebraska Press*. When the court closes a pretrial suppression hearing, there are no injunctions forbidding publication or requiring the press to guess at what it may or may not print. Thus, the judgment of the newspaper editor remains unimpaired. Compare *Nebraska Press Ass'n v. Stuart*, supra (certain information arguably, but not certainly, included in prohibition against publication), and *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256-57, 94 S. Ct. 2831, 2839 (1974) ("right of reply" statute impermissibly infringed on editor's discretion), with *Pittsburgh Press Co. v. Pennsylvania Human Relations Commission*, 413 U. S. 376, 93 S. Ct. 2553 (1973) (upholding prohibition against sex-classified advertising where discriminatory hiring was unlawful and editor could easily determine from face of advertisement if it was forbidden), and *Pell v. Procunier*, supra (editors not forbidden to print any information gathered in prison).

C. *No Other State Procedural Device Eliminates Prejudicial Disclosure*

Courts in the past have attempted to deal with prejudicial disclosure by lengthy voir dire of potential jurors, extensive continuances, burdensome sequestration, and

cautionary instructions. Because these techniques do not eliminate prejudicial disclosure, but only may reduce some of its effects, all have proven unsatisfactory in many cases. Only one other method, change of venue, may in some cases put a case beyond the physical range of disclosure, but it may not be effective in cases of statewide or national attention, such as *Commonwealth v. Boyle*, or *Estes v. Texas*, 381 U. S. 532, 85 S. Ct. 1628 (1965). Further, pretrial publicity may follow a case to its new venue.

Through voir dire, a court attempts to minimize the effect of pre-trial publicity by excluding from the jury those whom publicity has biased. But it cannot hope to eliminate all jurors who have been exposed to prejudicial information. In a highly publicized case, effective voir dire may distort the composition of the jury by screening out all those who take an active interest in news and public affairs. Neither a defendant nor the Commonwealth has an interest in seating such a jury. Other methods of dealing with prejudicial disclosure, such as sequestration, continuances, or cautionary instructions to the jury, do not realistically reduce premature prejudicial disclosure to which a jury is exposed.

Finally, many of the methods for eliminating the effects of prejudicial disclosure have other drawbacks. A continuance allows evidence to become stale and lengthens the period during which charges remain unresolved and the accused confined or held on bail pending disposition of the charges. Cf. *Gerstein v. Pugh*, 420 U. S. 103, 114, 95 S. Ct. 854, 863 (1975) (restraints on liberty caused by prolonged detention). Changes of venue and sequestration pose further problems of administration for courts and inconvenience for all persons connected with a case.

A rule of general application directly meeting the problem of prejudicial disclosure is indeed an appropriate

procedural device for the administration of a state court system of criminal justice. The Rules and orders challenged here meet that need by temporarily limiting access to pre-trial proceedings most likely to involve prejudicial material which, if disclosed, could deprive the defendant of a fair trial and impose unneeded burdens on the public and the judicial system. The challenged orders protected the defendants from disclosure by attorneys and witnesses participating in suppression hearings under Rule 323. Such disclosures can be just as prejudicial as public exposure of the proceedings.[29] Short of gagging the press, which is presumed to be unconstitutional, *Oklahoma Publishing Co. v. District Court,* supra; *Nebraska Press Ass'n v. Stuart,* supra, or permanently depriving the press access

29. Petitioners also asserted that the orders entered by respondents directing participants in the pre-trial proceedings not to discuss the proceedings were overbroad. We did not agree.

"[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama,* 377 U. S. 288, 307, 84 S. Ct. 1302, 1314 (1964), quoted in *Zwickler v. Koota,* 389 U. S. 241, 88 S. Ct. 391 (1967). A challenge solely to the breadth of a governmental regulation recognizes the lawfulness of the type of regulation; it attacks only the extent of the limitation as insufficiently related to the legitimate governmental interest.

The orders directing participants in the pre-trial proceedings not to discuss the proceedings, like the other orders, were designed to prevent harm to the accused's right to a fair trial and the public interest in prompt, orderly, and final administration of criminal justice by temporarily limiting access to information which might produce undue publicity. See notes 7 & 8 supra. If a participant could describe the events of the pre-trial proceedings, the court's other orders would be rendered useless.

Hence, respondents, through the Rules, had to be able to control the disclosures of every participant in those proceedings. We therefore conclude that the portions of these orders restricting comment upon the suppression hearings by participants were as closely tailored to eliminating prejudicial publicity as were the portions closing the suppression hearings and impounding the records thereof. Therefore, these portions of the orders cannot be considered overbroad.

to all information about a case, we believe our Rules and these orders are the most effective means of reducing premature prejudicial disclosure.

VI. Conclusion

This Court is fully aware of the great societal benefits our citizenry derives from access to all open court proceedings. Manifestly, that freedom has and continues to contribute significantly to the attainment of the effective administration of justice.

We must also be mindful of the Commonwealth's obligation to protect the right of the accused to a constitutionally required fair and speedy trial. Similarly, it must be recognized that the Commonwealth entertains a traditionally strong interest in protecting the fairness and integrity of criminal convictions obtained in its court system.

Adequate consideration must also be accorded the very pronounced public interest in having its system of criminal justice function so that jury trials are conducted promptly, fairly, and with finality. Due recognition must be given rules and procedures designed to achieve prompt and fair trials without the hazards of imposing on the state court system unnecessary and avoidable burdens such as retrials and extended trial delays. This is the true mission of the Rules of Criminal Procedure.

Experience has plainly demonstrated that premature disclosure of pre-trial suppression material creates a heavy and unnecessary burden upon the judicial process and adversely affects these public interests. Rules 323, 326 and 327 authorize a court in an appropriate case, if necessary, to limit or postpone access to pre-trial suppression hearing material so that the case may proceed in an orderly and timely fashion in an atmosphere free from the hazards and

prejudice which may be engendered by the premature disclosure of suppression material, the admissibility of which is yet to be judicially determined. It must be concluded here that the public interest in avoiding unfair and delayed trials and retrials outweighed the postponement of petitioners' access.

We concluded on the record as presented by petitioners that respondents' orders, which limited access to pre-trial suppression hearings in murder cases which had received great public attention, did not deny petitioners any clear legal right. We therefore denied petitioners the state remedies they sought. See *Central South Carolina Chapter v. Martin*, supra; *United States v. Gurney*, supra; but see *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N. E. 2d 127 (Ohio 1976). These orders were entered pursuant to the Pennsylvania Rules of Criminal Procedure, a set of state rules designed to administer criminal justice fairly and efficiently. The orders were closely tailored to meet the problems of prejudicial disclosure resulting from suppression hearings.

Accordingly, special relief was properly denied petitioners and our orders are reinstated in conformity with this opinion.

Mr. Justice Packel did not participate in the consideration of this opinion.

EXHIBIT 3.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 384 Misc. Docket 21

Petition for Writ of Mandamus and Prohibition
Petition for Plenary Jurisdiction
Petition for Expedited Hearing

PHILADELPHIA NEWSPAPERS, INC., et al.,
Petitioners

v.

THE HONORABLE DOMENIC D. JEROME

No. 399 Misc. Docket 21

Petition for Writ of Mandamus and Prohibition
Petition for Assumption and Plenary Jurisdiction

EQUITABLE PUBLISHING COMPANY, INC., et al.,
Petitioners

v.

THE HONORABLE ROBERT W. HONEYMAN

No. 400 Misc. Docket 21

Petition for Review in Nature of Prohibition
Application for Assumption of Plenary Jurisdiction

MONTGOMERY PUBLISHING COMPANY,
Petitioner

v.

THE HONORABLE ROBERT W. HONEYMAN

No. 401 Misc. Docket 21

Application for Assumption of Plenary Jurisdiction

MONTGOMERY PUBLISHING COMPANY,
Petitioner

v.

THE HONORABLE ROBERT W. HONEYMAN

No. 406 Misc. Docket 21

Petition for Writ of Mandamus and Prohibition
Petition for Assumption of Plenary Jurisdiction

EQUITABLE PUBLISHING COMPANY, et al.,
Petitioners,

v.

THE HONORABLE LAWRENCE A. BROWN

No. 407 Misc. Docket 21

Petition for Review in Nature of Prohibition
Application for Assumption of Plenary Jurisdiction

MONTGOMERY PUBLISHING COMPANY,
Petitioner

v.

THE HONORABLE LAWRENCE A. BROWN

Notice of Appeal.

Notice is hereby given that Philadelphia Newspapers, Inc., Montgomery Publishing Company, The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, Petitioners above named, hereby appeal pursuant to 28 U. S. C. § 1257(2) to the Supreme Court of the United States from the reinstatement, by Opinion dated April 28, 1978, reinstating the judgments herein vacated by the United States Supreme Court by Judgment dated February 7, 1978.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-155

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association. The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, *Appellants*,

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, *Appellants*,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant*,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors, *Appellants*,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant*,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeals From the Judgments of the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

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TABLE OF CITATIONS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-155

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, *Appellants*.

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and

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The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chaper, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, *Appellants*,

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The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant*,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeals From the Judgments of the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's rules, appellees move that the appeals from the judgments of the Supreme Court of Pennsylvania denying appellants' petitions for mandamus, prohibition and extraordinary relief be dismissed on the ground that they rest on an adequate and independent state ground, or, in the alternative, that the judgments be affirmed.

STATEMENT

Although the consolidated appeals docketed by appellants (all of whom are members of the press) arise out of three separate criminal proceedings to which appellants sought access, the issues in all three cases are the same. In each instance, a criminal defendant had been indicted for murder and was awaiting trial or retrial.[1] All of the cases were notorious and the crimes charged had been the subject of extensive coverage in the news media.[2] In each case, pretrial motions were filed by the respective defendants seeking the suppression of evidence alleged to have been unconstitutionally obtained, and each defendant further moved, pursuant to the Pennsylvania Rules of Criminal Procedure,[3] that the proceedings be held *in camera* and that confidentiality be maintained pending further order of the court. The respective trial judges issued orders providing for closure of the hearings, impoundment of the hearing records and the maintenance of confidentiality by those involved in the proceedings. Appellants subsequently moved to vacate the orders of the trial judges and to open the then-pending suppression hearings to the press. Following denial of their motions, appellants sought extrordinary relief, by way of prohibition and mandamus, in the Supreme Court of Pennsylvania. Their petitions were de-

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1. The defendant in the Delaware County case, W. A. "Tony" Boyle, had been previously tried and the conviction set aside on appeal.

2. The Boyle case charged the former President of the United Mine Workers Union with the murder of his chief rival for union leadership. It is described by appellants as involving a charge of an "execution-style" murder, and the extensive publicity it generated had led to a change of venue. The two Montgomery County cases involved, respectively, the murder of a policeman and the kidnap-murder of a young girl charged to a police officer. All three cases have now been tried.

3. The relevant rules are set forth in the Jurisdictional Statement (J.S.) at pp 3-6.

nied without opinion. An appeal (No. 77-308) was taken to this Court, and the cause was thereupon remanded on the ground that "the record does not disclose whether the Supreme Court of Pennsylvania passed on appellants' federal claims or whether it denied mandamus on an adequate and independent state ground." 434 U.S. 241 (1978).

In its opinion on remand, entered April 28, 1978 (App. 32 *et seq.*),[4] the Supreme Court of Pennsylvania ruled unanimously, *first*, that it had denied appellants' petitions because, as a matter of state law, a party seeking extraordinary writs must establish "a violation of clear rights not remediable by ordinary processes" (App. 41); *secondly*, that the Pennsylvania Rules of Criminal Procedure, as applied in these cases, satisfied federal constitutional standards. The instant appeals followed.

4. "App." references are to the appendix to appellants' Jurisdictional Statement.

ARGUMENT

I.

Appellants' Jurisdictional Statement proceeds immediately to an elaboration of their federal constitutional claims without reference to the Pennsylvania Supreme Court's initial ground of decision—that extraordinary relief was inappropriate in these cases as a matter of state law. Appellants thus presumably believe either (1) that the State Court, on remand, has abandoned its earlier procedural ground of decision or (2) that the enunciation of alternative state and federal grounds is sufficient to confer jurisdiction upon this Court. Neither position is tenable.

A party seeking to invoke this Court's appellate jurisdiction to review the decision of a state court has the burden of showing that the decision below did not rest upon an adequate and independent state ground. Thus, where it appears that the judgment of the state court "*might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952) (emphasis in original). It is the appellant's burden to "demonstrate" that state grounds cannot "account for the decision below." *Durley v. Mayo*, 351 U.S. 277, 281 (1956).

We find no basis in Justice Roberts' opinion for concluding that the court below has either abandoned or retreated from its reliance on the extraordinary character of the state writs invoked by appellants, which it stated was at the root of its initial denial of relief. On the contrary, his opinion for the court on remand undertakes to explain in detail, with extensive citation of authority, the state law limitations upon the availability of Pennsylvania's extraordinary writs. App. 40-41. Thus, the court notes that mandamus requires not only a "clear legal right in the plaintiff [and] a corresponding duty in the defendant," but also

the "want of any other adequate and appropriate remedy"; that mandamus will not issue to require "performance of a particular discretionary act"; that "presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief"; and that even a clear showing of aggrievement "does not assure that this Court will exercise its discretion to grant" such relief. *Ibid.* Accordingly, quite apart from the fact that appellants make no attempt to sustain their burden of establishing the lack of an adequate and independent state ground, the opinion below affirmatively indicates the presence of such a ground: that, in Pennsylvania, the extraordinary writs, unlike ordinary remedies, will be granted only in rare circumstances and in the exercise of the court's broad discretion. See, also, in this connection Justice Rehnquist's opinion upon the prior appeal of this case. 434 U.S. at 242.[5]

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5. Appellants make no claim that ordinary appellate remedies were unavailable in challenging the trial court orders of which they complain. As a general rule, appeals in homicide cases in Pennsylvania lie directly in the Supreme Court, while appeals in other criminal cases lie in the Superior Court, Pennsylvania's intermediate appellate court. However, where (as here) the question on appeal is a collateral one that "includes no consideration of the substance of the crime charged . . .," and where the issues would be the same whether the crime were "simple assault or murder in the first degree," appeals relating to homicide cases may lie in the Superior Court. Cf. *Commonwealth ex rel. Marshall v. Gedney*, 456 Pa. 570, 572 (1974) (appeal from extradition order in homicide case lies in Superior rather than Supreme Court). Appellants here might also have challenged Pennsylvania's rules relating to closure of pre-trial suppression proceedings by instituting an original action for declaratory judgment and injunction under the Uniform Declaratory Judgments Act as adopted in Pennsylvania, 12 P.S. §§831-846. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *certiorari denied sub nom., Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976), where the validity of rules similar to those challenged in this case was litigated through a declaratory judgment and injunction proceeding. (*cont'd*)

The fact that the Pennsylvania Supreme Court proceeded further, explaining at length its reasons for believing that its Rules of Criminal Procedure, as here applied, meet the demands of the United States Constitution, cannot alter the result. Before this Court "may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause," *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937).

II.

Even if one assumes, contrary to our suggestion above, that jurisdictional requirements may be deemed satisfied in this case, we submit that there is no occasion for plenary review of the judgments below.

The decisions of this Court make it inescapably plain that the press has no "constitutional right of special access to information not available to the public generally," *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). See, also, *Houchins v. KQED, Inc.*, 98 S.Ct. 2588 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974). This is particularly clear where the reason for temporarily denying access to the public is to protect an accused whose constitutional right to a fair trial is threatened by prejudicial pretrial publicity. Indeed, in such cases the courts have a positive duty to adopt "those remedial measures that will prevent

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Note 5—Continued:

Nor can it be suggested that it serves no "legitimate state interest" (see *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)) for Pennsylvania to confine closely the availability of the extraordinary writs where other remedies are available—a practice which has its counterpart in federal proceedings, *De Beers Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

the prejudice at its inception" and "must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Since it is ordinarily impermissible to enjoin publication of matter that has already reached the press, the protective measures, such as closure of pretrial proceedings, must be initiated before the prejudicial information enters the public domain. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976) (opinion of the Court) and 601 (separate opinion of Justice Brennan). These propositions have been more fully discussed in our response to appellants' prior Jurisdictional Statement, which is on file with the Court (No. 77-308), and are elaborated in the opinion below and in the recent opinion of the New York Court of Appeals in *Gannett Co. v. De Pasquale*, 43 N.Y. 2d 370, 372 N.E. 2d 544 (1977), *certiorari granted*, 98 S.Ct. 1875 (1978).

Appellants claim, however, that even if there is no unqualified right of public access to pretrial judicial proceedings, the Pennsylvania Rules are vulnerable because (so they assert) they call for automatic closure on motion of the defendant and impose no requirement of a judicial determination of the character of the threat to a fair trial and the need for the requested remedy. The claim has some plausibility if one confines oneself to the text of Rule 323. The Rule is silent as to the criteria and procedures to be employed upon the filing of a defendant's motion.[6]

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6. Appellants stress the language of Rule 323(f) (J.S.4), which reads as follows:

> The hearing, either before or at trial, shall be held in open court unless defendant, by his counsel, moves that it be held in the presence of only the defendant, counsel for the parties, court officers and necessary witnesses. In any event, the hearing shall be held outside the hearing and presence of the jury. In all cases the court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 326 and 327.

The Rules, however, do not stand unadorned. They have been authoritatively construed by the Supreme Court of Pennsylvania. As construed, Pennsylvania trial judges are bound to exercise discretion and to tailor any protective order they issue to the necessities of the case. Moreover, the facts of these cases, as judicially noticed by the Supreme Court of Pennsylvania and as averred by appellants themselves (App. 36, n. 3), persuaded the court that the Rules, as applied, were properly based and appropriately limited.

So far as the facts are concerned, the court noted that each of the cases involved a notorious murder that had attracted widespread publicity; that each involved a motion to suppress evidence allegedly obtained in violation of constitutional rights; and that publicity identifying the defendant with evidence of the character sought to be suppressed carried a substantial danger of prejudice (App. 36-38, 44-45). It was "on the record as presented" (App. 62) that the court upheld the application of the Rules.

Far from holding that closure and confidentiality would be automatically imposed on pretrial proceedings on motion of the defendant, the court referred to grant or denial of such a motion as a "discretionary act" (App. 40, n. 11). It further described the challenged Rules as "authoriz[ing] a court in an appropriate case, if necessary, to limit or postpone access to pretrial suppression hearing material . . ." (App. 61). Acutely conscious of the need to avoid overbroad orders in situations where there is friction between the right of a defendant to a fair trial and the interest of the public in securing information concerning the operation of the judicial system, the court stated (App. 50-51):

> We believe that any limitation on access should be carefully drawn. First, the right of access to court proceedings should not be limited to any reason less than the compelling state obligation to protect con-

stitutional rights of criminal defendants and the public interest in the fair, orderly, prompt, and final disposition of criminal proceedings. Second, access should not be limited unless the threat posed to the protected interest is serious. Third, rules or orders limiting access should effectively prevent the harms at which they are aimed. Finally, the rules or orders should limit no more than is necessary to accomplish the end sought.[7] [footnotes omitted]

In light of the above, it is apparent that appellants' characterization of Pennsylvania's Rules as "mandating closed pretrial suppression hearings and impounded court records based solely on the request of the defendant and without hearing or any finding of intending [sic] prejudice" (J.S. 13) is far wide of the mark. On the contrary, the Supreme Court of Pennsylvania, in a construction of the Rules binding on this Court, has required the exercise of discretion and has been solicitous in insisting that orders issued in the exercise of that discretion be limited to the necessities of the case. Since this approach is fully in accord with the consistent line of this Court's decisions from *Sheppard v. Maxwell* to the present, the judgments below should be affirmed.

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7. In its "Conclusion" (App. 61-62), the court repeated:

Experience has plainly demonstrated that premature disclosure of pre-trial suppression material creates a heavy and unnecessary burden upon the judicial process and adversely affects these public interests. Rules 323, 326 and 327 authorize a court in an appropriate case, if necessary, to limit or postpone access to pre-trial suppression hearing material so that the case may proceed in an orderly and timely fashion in an atmosphere free from the hazards and prejudice which may be engendered by the premature disclosure of suppression material, the admissibility of which is yet to be judicially determined. It must be concluded here that the public interest in avoiding unfair and delayed trials and retrials outweighed the postponement of petitioners' access.

It is also important to emphasize that, contrary to suggestions contained in the Jurisdictional Statement, the Pennsylvania Rules, as authoritatively construed in the opinion below, do not authorize any *permanent* "mantle of secrecy" (J.S. 20) on pretrial suppression proceedings. Justice Roberts' opinion for the court observes that, since "all three trials have been completed," "the challenged orders may have expired" (App. 57). See also footnote 10 of the opinion below and accompanying text (App. 39), citing, with approval, *United States v. Cianfrani,* 573 F.2d 835 (3d Cir. 1978), holding that "tapes defendant sought to suppress must be made public after defendant has pleaded guilty." At issue here, then, are *temporary* closures, effective only in the relatively brief period just prior to the beginning of the trial, when the danger of prejudice to the defendant is the greatest. If matters of public importance or interest—evidence, for example, of police or prosecutorial misconduct—emerge at suppression hearings that are closed to the press and the public in order to safeguard defendants' rights, they may be fully aired in the press after the need for that protection has expired.

We recognize the possibility that this Court's decision in the pending *Gannett Co.* case may add some refinements to this Court's prior pronouncements. That, however, would hardly necessitate a remand of the instant case. As observed in the opinion below, in all three cases the trials have long since been completed (App. 57). Such further guidance as might be provided by this Court in the *Gannett* litigation could have no effect in these Pennsylvania cases. Since the trials, as well as the pretrial proceedings, have been concluded, there can be no occasion to issue further instructions to the respective trial judges who entered the orders here under review. Thus, insofar as *Gannett* may provide added guidance, its significance for Pennsylvania courts and cases will be prospective only.

CONCLUSION

For the reasons stated in Point I, these appeals should be dismissed. If, contrary to our submission, the Court should find that disposition inappropriate, the judgments below should be affirmed.

Respectfully submitted,

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September 1978

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-155.

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter,

Appellants,

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors,

Appellants,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company,

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and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors,

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The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company,

Appellant,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeal From the Judgment of the Supreme Court of Pennsylvania.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

I. The Motion to Dismiss Should Be Denied.

This is the second Appeal of these cases. This Court previously vacated the orders of the court below and remanded for an explanation of whether those orders were based upon a rejection of Appellants' federal claims or because of the peculiarities of state procedural and remedial law. Exhibit 1 to the Jurisdictional Statement ("JS"). In response, the opinion of the Pennsylvania Supreme Court [1] explained that Appellants' petitions to that court were denied *solely* because Appellants had not shown that the denial of access to an integral portion of a criminal proceeding violated their federal constitutional rights:

> "We concluded on the record as presented by petitioners [2] that respondents' orders, which limited access to pre-trial suppression hearings in murder cases which had received great public attention, did not deny petitioners any clear legal right. We *therefore denied* petitioners the state remedies they sought."

JS, at page 62 (emphasis supplied).

Thus, the court below made no determination that Appellants had failed to fulfill any state law procedural requirement of mandamus or prohibition. Instead, the decision to be reviewed in this Court was based entirely upon the finding that Appellants' federal constitutional claims were

1. JS, Exhibit 2.

2. Since no Pennsylvania court held a hearing to determine whether any of the petitioning criminal defendants could show facts to justify limitation on the public's right to attend the suppression hearings below, the "record" consisted only of Appellants' petitions to the Pennsylvania Supreme Court. JS, at page 36, n.4.

not established.[3] See also, JS, at page 41. As discussed in Section II hereof, the decision below on the merits was itself based upon the unconstitutional and irrebuttable presumption of fact that any objecting defendant would inescapably be prejudiced irreparably by an open pretrial suppression hearing. See JS, at pages 56, 53, 54.[4]

Accordingly, the Motion to Dismiss should be denied.

II. The Motion to Affirm Should Be Denied.

Appellants have in the Jurisdictional Statement set forth why there are substantial federal questions presented in this appeal which deserve full briefing and argument by counsel. In opposition thereto, Appellees propose summary affirmance based entirely upon a mischaracterization of the opinion of the Supreme Court of Pennsylvania.

Central to the grounds asserted for summary affirmance is the following inaccurate assertion by Appellees:

3. Appellees' Motion to Dismiss argues grounds of state law upon which the Pennsylvania Supreme Court could have ruled—but did not rule—in this case. Contrary to the implication by Appellees, the Pennsylvania Supreme Court's opinion below *nowhere* purports to determine that *in this case* (1) there was any other adequate and appropriate remedy available to Appellants, (2) Appellants were seeking performance of a discretionary act, or (3) there was any basis, other than a rejection of Appellants' federal constitutional claims, upon which that court grounded its refusal to grant the relief requested. Thus, citation in the Motion, at pages 5-6, to the decision of the court below is inaccurate in failing to show that the court below relegated to a single footnote (JS, at pages 40-41, n.11) its very generalized, unspecific summary of state procedural law.

4. For example:

"The orders here are limited to pre-trial suppression hearings, which involve materials *likely* to be prejudicial to defendants." (JS, at page 56) (emphasis supplied).

"Our Rules are designed to give defendants such as Boyle, Palmer, and Phillips, all charged with murder for crimes generating substantial public attention, the opportunity to be tried, like any other persons accused of crime, on the basis of facts presented at trial." (JS, at page 53).

> "Far from holding that closure and confidentiality would be automatically imposed on pretrial proceedings on motion of the defendant, the court referred to grant or denial of such a motion as a 'discretionary act' (App. 40, n. 11)." Motion, at page 9.

As previously mentioned, however, the Pennsylvania Supreme Court held that because of the irrebuttable factual presumption of inescapable and irreparable prejudice in the absence of closure, and because of the need for a uniform rule of state-wide application, the matter is *automatically* determined in Pennsylvania courts adversely to the right of access.

The opinion below does not purport to "construe" the clear mandatory language of the rules that very court adopted. It accepts those rules at face value and applies them exactly as they are written. Moreover, the opinion does not recognize or permit any meaningful discretion of Pennsylvania trial courts once a criminal defendant has asserted his absolute right under Rule 323(f) of the Pennsylvania Rules of Criminal Procedure to have the courtroom closed to the public and the press.

In fact, the court below sustained the rules pursuant to which Appellants were denied any access to pretrial suppression hearings. Such testimonial hearings are "often the critical stage in a criminal prosecution" because the results of those hearings are, as a practical matter, frequently outcome determinative. *United States v. Cianfrani*, 573 F. 2d 835, 850 (3d Cir. 1978). Sustaining the validity of the rules challenged in this appeal, the court below wrote:

> "A rule of *general application* directly meeting the problem of prejudicial disclosure is indeed an appropriate procedural device for the administration

> of a state court system of criminal justice. . . . [W]e believe our Rules and these orders are the most effective means of reducing premature prejudicial disclosure." JS, at pages 59-61 (emphasis supplied).

And although no hearing to consider the facts of these cases was convened in any of the trial courts or required by Pennsylvania Supreme Court, that court ruled that the orders granting secret suppression hearings "were entered pursuant to the Pennsylvania Rules of Criminal Procedure, a set of state rules designed to administer criminal justice fairly and efficiently." This appeal properly challenges the constitutionality of secrecy orders which the Supreme Court of Pennsylvania has upheld even though entered without a hearing on the necessity or propriety of secret suppression proceedings.

Thus, the Pennsylvania Supreme Court has not "required the exercise of discretion" by trial courts (Motion, at page 10), but it has in fact precluded any meaningful discretion by the trial courts or any exercise of the public's right of access to criminal proceedings. It has done so by approving orders which may be permanent in nature,[5] and which were entered without determination of available alternatives imposing less burden upon the constitutional rights of Appellants. See *Nebraska Press Ass'n v. Stuart*, 427 U. S. 539, 562-565, 49 L. Ed. 2d 683, 699-701, 96 S. Ct. 2791 (1976).

Neither the trial courts nor the state Supreme Court considered *voir dire*, continuances, sequestration, precautionary jury instructions, or change of venue *in the circumstances of the cases at bar*. Instead, a legislative finding of across-the-board inadequacy of alternatives was made *a priori* in the promulgation of the Rules. JS, at pages 58-60.

Although the Motion argues (at page 10) that summary affirmance is required because of "a construction of the [Pennsylvania] Rules binding on this Court," Appellees do not, however, adequately address the questions presented in the Jurisdictional Statement. One of those questions (No. 1) challenges Rules 323(f) and (g) as void on their face in violation of the First, Fifth, Sixth, and Fourteenth Amendments, and as denying Appellants their right to a hearing and a showing that actual prejudice to the constitutional right of the criminal defendant cannot be avoided by other, less obtrusive measures and that a closed suppression hearing will prevent such prejudice. The Motion is silent on all of these claims except possibly to the extent they are based upon the First Amendment. The Fifth, Sixth, and Fourteenth Amendment claims are substantial,[6] however, and interrelated with the First Amendment claim. They should be addressed by the Court following full briefing and argument by the parties.

Similarly, the Motion does not adequately address the second question presented in the Jurisdictional Statement. That question (No. 2) challenges the Pennsylvania Rules, both on their face and as applied in this case, as impermissible prior restraints in violation of the First and Fourteenth Amendments. Irrespective of whether the court below construed the state court rules, the Motion does not address the challenge to the application of those Rules to this consolidated appeal, where legislative-type fact finding has been substituted for judicial determination of

5. Although Appellees rely heavily on the language of the court below that "the challenged orders may have expired" (JS, at page 57; Motion, at page 11), this statement inherently admits of the opposite possibility: that the challenged orders may be permanent and *not* expire. See Pa. R. Civ. P. Rule 323(f), (g). Appellants are still denied access even to the transcripts of the proceedings in question.

6. See JS, at pages 13-20, and the many decisions cited therein at notes 10 and 12.

the actual facts of each criminal proceeding. Again the question presented is substantial and deserving of the plenary review by this Court.

This appeal presents issues similar but not identical to those presented in *Gannett Co., Inc. v. Hon. Daniel A. DePasquale*, No. 77-1301 (certiorari granted May 19, 1978). These cases are more extreme than *Gannett Co.*, because here access to criminal proceedings was denied solely because of the statewide rule of universal and mandatory application. The Motion to Affirm should be dismissed, and this appeal should be fully briefed and presented to the Court for plenary determination in conjunction with the *Gannett Co.* case. JS, at pages 19-20.

CONCLUSION.

For the reasons set forth above and in the Jurisdictional Statement, Appellee's Motion to Dismiss or Affirm should be denied in its entirety.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 78-155

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellant,

v.

THE HON. DOMENIC D. JEROME, *et al.*,
Appellees.

Brief Amicus Curiae of

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

In Support of Appellant

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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INTRODUCTION

These cases pose a critical question: do the First and Sixth Amendments to the United States Constitution permit trial judges to seal off from the public and the press post-indictment proceedings prior to the opening of the trial – without any notice or effective hearing and without presenting any specific showing of a clear and present danger to the administration of justice. Amicus believes that no more important ques-

tion has been presented to this Court concerning public accountability of the judiciary since *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

The rule enunciated by the Pennsylvania Supreme Court limiting press and public access to pretrial proceedings, if not reversed, would have a significant public impact, because approximately ninety percent of all criminal indictments in this country are settled prior to the formal opening of the trial. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 134 (1967). Thus, the rule would in effect give trial judges the broad discretionary power to seal off, virtually at will, their activities in nine out of every ten criminal cases which pass through the state court systems.

Moreover, it is not only judges' conduct which would be hidden from public scrutiny. Many pretrial proceedings raise critical legal issues as to whether constitutional standards have been respected by the prosecution and the police – for example, in obtaining confessions, in issuing search warrants for the seizure of evidence, in making arrests and issuing arrest warrants, in using informers, in placing wiretaps, and in conducting plea bargaining.

Because there is no trial in ninety percent of the criminal cases, the pretrial proceeding may be the only forum for public information about official conduct. Giving politically-appointed or elected trial judges the broad discretionary power to seal these proceedings would in many cases insulate the judiciary, the prosecution and the police from any meaningful public accountability. It would encourage the type of political corruption prevalent in the state judiciaries prior to the great reform movement led by the late Chief Justice Vanderbilt of New Jersey. It would exacerbate partisan political pressure on the judicial branch – the branch that has always been the most open, and therefore the most trusted, branch of our government.

As a result, the judiciary would become more vulnerable to money, ambition, votes and all the considerations so alien to the fair administration of justice.

Amicus submits that the history, philosophy and common practices of the American courts before, and immediately after the drafting of the Sixth Amendment establish that the Framers of the Constitution, in drafting the Sixth Amendment, adopted the established principle that the public and the press have a vested right to attend *all* post-indictment stages of criminal proceedings.

Based on the history and development of the Sixth Amendment and on the significant and adverse impact of a pretrial secrecy rule, Amicus contends that the public and the press have a vested constitutional right to attend all stages of post-indictment proceedings; and, furthermore, that such a right can only be limited if (a) there is convincing evidence that attendance by the public and the press will "pose a serious and imminent threat of interference with a fair trial,"[1] and (b) there are no possible alternatives, such as a change of venue or close questioning of jurors. In other words, the standards applied in *Nebraska Press Ass'n v. Stuart, supra,* should be applied here – and for the same reasons.

This brief will be limited to these issues.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and Freedom of Information interests of the public to know

[1] Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

about the operation of all forms of government, through its press.

The interest of the Reporters Committee in the constitutionality of orders restricting public information about the courts is well known to this Court, as it has appeared before this Court in virtually every recent case challenging restrictions on the collection and publication of information about court proceedings, including:

* *Dickinson v. United States*, 414 U.S. 979 (1973), *cert. denied;*
* *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974), stay granted;
* *Times-Picayune Publishing Corp. v. Schulingkamp*, 420 U.S. 985 (1975), dismissed as moot;
* *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975), stay denied;
* *Nebraska Press Ass'n. v. Stuart, supra;*
* *Central South Carolina Chapter, Society of Professional Journalists v. Martin*, 46 U.S.L.W. 3437 (U.S. January 9, 1978); *cert. denied*, and
* *Gannett Co., Inc. v. DePasquale* (in support of the Petition (U.S. May 1, 1978), *cert. granted.*
* *Gannett Co., Inc. v. DePasquale* (Amicus curiae brief in support No. 77-1303.

The Committee is primarily supported by press donations and relies heavily on volunteer efforts to conduct its activities – such as this brief which is a *pro bono publico* effort by Attorneys for Amicus aided by law student interns Lee Helfrich (American University Law School), Steven Helle (University of Iowa College of Law) and

Shelley Steuer (University of California at Los Angeles Law School).

The Reporters Committee for Freedom of the Press submits this brief *amicus curiae* in support of the Appellant Philadelphia Newspapers, Inc., with the consents of the Appellant and Appellees (see Appendix A).

NOTE: The Argument portion of this brief is virtually identical to the brief submitted to this Court *amicus curiae* by The Reporters Committee in the *Gannett* case, *supra*, which raises the identical question of what standard trial judges must follow when seeking to close pretrial proceedings.

Amicus submits this brief separately because Rules 42(1) and 42(2) of this Court mandate different procedures for the filing of *amicus curiae* briefs supporting Jurisdictional Statements as opposed to those supporting petitioners in cases before the Court on the merits.

QUESTION PRESENTED

May the public and the press, consistent with the First and Sixth Amendments to the United States Constitution, be ejected from traditionally public pretrial hearings whenever a trial judge – without any supporting evidence – believes that publication of truthful statements concerning the hearing may threaten the right of a defendant to an impartial jury and

a. when the history of the Sixth Amendment clearly shows that the Framers of the Constitution and the post-Constitutional courts believed that the public had an absolute right to attend all pretrial hearings; and

b. when the contemporaneous impact of pretrial secrecy would be to forego effective public scrutiny of the conduct of prosecutors, judges and police officers in nine out of every ten criminal cases in the state trial systems?

STATEMENT OF THE CASE

The Amicus summarizes the statement of facts as follows:

All three Pennsylvania cases, consolidated in this Appellant's Jurisdictional Statement, rest on the same provision of the Pennsylvania Rule of Criminal Procedure 323 (f) and (g). This rule requires the closing of any pretrial proceedings in criminal cases *at the mere request of a criminal defendant* without any supporting evidence that attendance by the public and the press will pose a clear and present danger to the administration of justice.

1. In May 1977, pretrial proceedings opened before the Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania, on a

murder indictment charging that W. A. (Tony) Boyle, former President of the United Mine Workers union, arranged for the deaths of union dissident Joseph Yablonski, his wife and daughter.

Mr. Boyle's attorney made a motion to seal all pretrial proceedings and transcripts under the Pennsylvania rule. The trial judge granted the motion and also imposed a no comment order on all attorneys, witness and other participants. (Appellant's Brief at 8-9).

2. In *Commonwealth v. John Palmer* (No. 149-77), a pretrial proceeding was commenced in the Montgomery County Court of Common Pleas on an indictment charging John Palmer, a policeman, with the kidnap and murder of a young girl. The presiding judge, the Honorable Robert W. Honeyman, sealed the pretrial proceedings and the transcripts under the state rule.

3. In *Commonwealth v. Larry J. Phillips* (No. 5060-76), a pretrial proceeding was held in the Montgomery County Court of Common Pleas on a indictment charging that Larry Phillips had murdered a Montgomery County policeman. The presiding judge, the Honorable Lawrence A. Brown, sealed the pretrial proceedings and impounded the transcripts under the Pennsylvania rule.

All three pretrial sealing orders were appealed in a consolidated case to the Pennsylvania Supreme Court, which declined to review the orders without opinion on May 23, 1977.

This Court vacated the order of the Pennsylvania Supreme Court on January 9, 1978, and remanded the case for clarification of the record.

On April 28, 1978, the Pennsylvania Supreme Court reinstated its prior judgment affirming the orders in an opin-

ion which upheld both the substantive and procedural requirements of the Pennsylvania pretrial rule. (Appellant's Brief at 12). "The Rules upon which the challenged orders were based serve an important function in this scheme by avoiding premature disclosure of information which would jeopardize the right of an accused to an impartial jury."[2]

The Pennsylvania Supreme Court stated that "most damaging information from outside the courtroom comes from pretrial suppression" hearings.[3] The court, however, recognized that "access to court proceedings should not be limited for any reason less than the compelling state obligation to protect constitutional rights of criminal defendants" and "unless the threat posed [by media and public participation] to the protected interest is serious."[4]

It noted that there are other ways to minimize the effects of this type of news coverage of pretrial proceedings – such as changing the location of the trial, delaying the trial, carefully questioning jurors before they are selected, and sequestering jurors once they are selected.[5] However, the court concluded that most of these solutions pose "problems of administration for the courts and inconvenience for all persons connected to the case."[6]

The court said it was "fully aware of the great societal benefits our citizenry derives from access to all open court

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[2] Philadelphia Newspapers, Inc. v. Jerome, 3 Med. L. Rep. 2185, 2188 (1978).

[3] *Id.* at 2192.

[4] *Id.* at 2191-2192.

[5] *Id.* at 2189.

[6] *Id.* at 2195.

proceedings."[7] But, it added, this First Amendment right of the public to attend judicial proceedings creates a "heavy and unnecessary burden on the judicial process" because of the dangers that the suspect will not obtain a fair trial as guaranteed by the Sixth Amendment.[8]

The court's ruling, therefore, while recognizing that the public's interest should be restricted *only* in compelling circumstances, *nevertheless allows a judge, in his sole discretion and without producing any evidence of damage, to seal pretrial proceedings and records as long as the case is, in the judge's judgment, of sufficient "notoriety."*[9]

This Amicus brief is filed in support of the Jurisdictional Statement seeking review of the constitutionality of that decision.

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[7] *Id.* at 2196.

[8] *Id.*

[9] *Id.* at 2194.

ARGUMENT

I

THE HISTORY, CONTEMPORARY PRACTICE AND COMMON UNDERSTANDING OF THE PUBLIC TRIAL GUARANTEE ESTABLISH THAT THE SIXTH AMENDMENT VESTED IN THE PUBLIC AND THE PRESS AN ALMOST ABSOLUTE RIGHT TO BE PRESENT DURING ALL STAGES OF A CRIMINAL PROCEEDING.

All available historical evidence demonstrates that the Sixth Amendment was intended to vest in the public and the press a right to attend all post-indictment proceedings, even when there is strong evidence that publicity about the proceeding would make it difficult to select an impartial jury. Since words of the Constitution should be interpreted with due regard to the intent of the Framers,[10] Amicus believes that the following history of the open trial guarantee will be helpful to the Court.

Closed post-indictment proceedings are inconsistent with the history, philosophy, practice and intent of the public trial guarantee. This conclusion is demonstrated by the history of the public trial guarantee as evidenced by (1) its historical evolution in the colonies and its inclusion in the Constitution; (2) the absence of even a single instance of closed pretrial proceedings in an exhaustive survey of cases in the Commonwealth of Massachusetts from 1760 to 1830; and (3) the express application of the guarantee in a pretrial hearing in the most celebrated criminal trial of the period – the trial of Aaron Burr.

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[10] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 151-153 (1968); In Re Oliver, 333 U.S. 257, 266-271 (1948).

A. The Public Trial Provision Evolved from Well-Established Common Law.

The public trial provision of the United States Constitution has generally been viewed as an outgrowth of the common-law practice that "the trial is always public."[11] A succinct explication of the early philosophy of the provision is offered by one author who examined the common law system of England – the common law system adopted by the colonies:

> [Evidence is given] in the open court, and in the presence of the parties, their attornies, counsel, *and all by-standers*, and before the judge and jury: exceptions [made to competency of evidence or witnesses] are PUBLICLY stated, and by the judges openly and publicly disallowed; – wherein if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers.[12]

The right of the public to attend all judicial proceedings was viewed by American colonists as an essential guarantee, as evidenced by the fact that public trial provisions were contained in several states' charters. For example, the "Concessions and Agreements of West New Jersey" contained the following language:

> That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely

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[11] 3 J. Story, Commentaries on the Constitution of the United States 662 (unabr. rep. 1970) (1st ed. Boston 1883).

[12] M. Hale, The History of the Common Law of England 343-344 (Runnington 6th ed. London 1820) (capitalization in original; emphasis supplied).

> come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner or in any covert manner* ***.[13]

This West New Jersey provision has been viewed as "an important step in the development which culminated in the federal Bill of Rights"[14] and, thus, illuminates the intention of the Sixth Amendment's drafters. Indeed, the Charter provision was described by its own writers as forming "a foundation for after ages to understand their liberty" and representing "the common law of fundamental rights and privileges * * * agreed upon * * * to be the foundation of the government."[15]

The Pennsylvania Frame of Government, drafted in 1682 by William Penn, as well as the latter Pennsylvania Declaration of Rights, provided that "all courts shall be open."[16] Similarly, the Declaration of Rights drafted by Massachusetts and Vermont contained provisions for public court proceedings.[17]

Moreover, none of the charters of the original states mentioned the exclusion of the public from any stage of any judicial proceeding.

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13 Concessions and Agreements of West New Jersey, 1677, *quoted in* 1 B. Schwartz, The Bill of Rights: A Documentary History 125 (1971).

14 1 B. Schwartz, *supra* note 13 at 125.

15 *Id.*

16 Pennsylvania Declaration of Rights, 1776, *quoted in* 1 B. Schwartz, *supra* note 13 at 271.

17 1 B. Schwartz, *supra* note 13 at 323, 372.

In light of the English common law, the charters of New Jersey, Pennsylvania, Massachusetts and Vermont, and the absence of any suggestion to the contrary in basic governing instruments, it must be concluded that the colonists intended to secure for themselves and the generations that would follow a nearly undeniable – if not absolute – right to attend any and all stages of judicial proceedings.

There is no evidence to suggest that the drafters of the Sixth Amendment intended to secure for the people any less extensive a right than that conceived by the drafters of the state charters or accorded by common law. Madison's first proposals to the Congressional Convention contained a public trial provision.[18] That right subsequently became part of the Sixth Amendment in 1791, and most of the original states, as well as those later admitted to the Union, adopted similar provisions in their respective constitutions.[19]

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18 Note, The Rights to a Public Trial in Criminal Cases, 41 N.Y.U.L. Rev. 1138, 1138 (1966).

19 The Constitution of The United States – Analysis and Interpretation, U.S. Government Printing Office 1199-1200 (1973).

B. The Courts of the Commonwealth of Massachusetts, a strong Common Law Colony and then State, Never Conducted a Judicial Proceeding which Excluded any Member of the Public or the Press Prior to or Immediately After the Adoption of the Sixth Amendment.

An examination of all trials that took place in the Commonwealth of Massachusetts immediately preceding and subsequent to the adoption of the Sixth Amendment provides further evidence that the Founders of our nation intended that the public and the press have a vested right to attend all stages of judicial proceedings.

In what Amicus believes is the only exhaustive survey of its kind, a noted legal scholar from the Yale Law School read, with narrow exceptions, every trial that took place in the Commonwealth between 1760 and 1830. In an affidavit (Appendix B), Professor William E. Nelson, author of "The Americanization of the Common Law," states the following:

> During the course of my research on that book, I read every case that exists on record, as far as I know, in the Commonwealth of Massachusetts between the years of 1760 and 1830, with the exception of cases dealing with probate, divorce, and matters before the legislature.
>
> In examining those records, I found no indication that the public had ever been excluded from any stage of any proceeding, including post-indictment proceedings in criminal cases.
>
> Therefore, it would be my opinion, based on my research, that the common law and the common understanding of the period was that the public had a right to attend all stages of criminal proceedings.

It certainly must be assumed that sometime between 1791, when the Sixth Amendment was adopted, and 1830, the last year surveyed by Mr. Nelson, there were several cases in the Commonwealth of Massachusetts which generated substantial prejudicial information and political passions. Nonetheless, Mr. Nelson "found no indication" that the press or the public had been excluded from any stage of any judicial proceeding.[20]

These results of Professor Nelson's survey strongly suggest that both the pre- and post-Constitutional periods recognized an absolute right in the public and the press to attend all judicial proceedings.

C. The Aaron Burr Trial Is a Pretrial Case in Point

The most celebrated criminal trial in America's early history is persuasive evidence that the Sixth Amendment guaranteed access of the public and the press to all stages of criminal proceedings – even a proceeding in which the judge was aware that the publicity might deprive the defendant of an impartial jury.

Persons came to Richmond from near and far in 1807 to watch Colonel Aaron Burr's trial for treason, Chief Justice John Marshall presiding. Chief Justice Marshall permitted the proceedings against Burr to remain open to the

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[20] Amicus understands, of course, that the Sixth Amendment was not then applicable to the states. However, it is the contention of Amicus that the common law reflected in state court proceeding is relevant in determining the intent of the Framers.

public and the press at every stage, even before an indictment was handed down by the grand jury. Indeed, one scholar noted that the proceedings were as much a battle to gain public sentiment as to gain a legal verdict.[21] The lawyers spoke to the spectators crowded into the courtroom far more than they did to the bench. And the throng inside the courtroom then repeated their words to the "thousands who could not get into the hall [to hear] what had been said by the advocates."[22]

It is doubtful whether in our post-Constitutional history there has ever been more public sentiment and prejudice stirred up by a single criminal proceeding as that against Burr – who was opposed by Jefferson at his highest peak of "popular idolatry."[23] Albert J. Beveridge, in his classic biography of John Marshall, observed that:

> so vocal and belligerent was the patriotic majority of people who were convinced of Burr's guilt that men who at first held opinion contrary to the prevailing sentiment, or who entertained serious doubt of Burr's guilt, kept discreetly silent. So aggressively hostile was public feeling that, weeks later, when the bearing and manners of Burr, and the devotion, skill, and boldness of his counsel had softened popular asperity, *Marshall declared that, even then, "it would be difficult or dangerous for a jury to venture to acquit Burr, however innocent they might think him"*[24] (emphasis supplied).

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21 A. Beveridge, The Life of John Marshall 421 (1919).

22 *Id.* at 420.

23 *Id.*

24 *Id.* at 401, quoting Blennerhassett Papers: Safford 465. *See id.* at 388-390.

Before the trial began, the chief prosecutor indulged in a tactic designed to prejudice public sentiment. He made a pretrial motion that Burr be kept in custody during the pendency of the trial, expecting Marshall to deny it and thus encourage the Republican press to further criticize Marshall's "leniency" to "traitors."[25] Marshall, however, allowed the prosecutor to present evidence on the motion at a public pretrial proceeding, while soundly criticizing his attempted maneuver to capitalize on the public nature of the proceedings. Marshall said:

> The court perceives and regrets that the result of this motion may be publications unfavorable to the justice, and to the right decision of the case; but if this consequence is to be prevented, it must be by other means than by refusing to hear the motion. No man, feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice, especially in criminal prosecutions, can view, without extreme solicitude, any attempt which may be made to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him, but by public feelings, which may be and often are artificially excited against the innocent, as well as the guilty.[26]

Marshall did not even hint that closing the pretrial proceeding to the public might be a viable alternative, although he was fully cognizant of the presence of the public and the press, and of their susceptibility to prejudice in a very high degree. But the proceeding – a pretrial proceeding – re-

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25 *Id.* at 423.

26 1 D. Robertson, Reports of the Trials of Colonel Aaron Burr (1808).

mained open. Chief Justice Marshall's adherence to the principle that the public must be permitted to attend even the most prejudicial type of pretrial proceeding was vindicated when the jurors – all of whom had admitted their prejudice against Burr[27] – returned a verdict of acquittal.

D. The Historic Erosion of the Public's Right To Attend Post-Indictment Proceedings Does Not Support the Action of the Court Below.

The favorable predisposition toward openness mandated by the Sixth Amendment continued through the mid-nineteenth century, for as Professor Lieber, whose philosophy has been described as representing the mainstream of nineteenth century thinking,[28] noted in his book, "On Civil Liberty and Self-Government," first published in 1853, "All governments hostile to liberty are hostile to publicitiy * * *."[29]

Beginning around 1880, however, the judiciary began limiting the scope of the public trial guarantee. The Kansas Supreme Court upheld a lower court's order excluding ladies from the audience while obscene testimony was taken.[30] A Texas Court of Appeals approved the exclusion of an audience that had engaged in laughing at a witness's testimony during the course of a rape trial.[31] In one curious case the California Supreme Court validated an order excluding all members of the public except those connected with the case, on the presumption that the appellant had assented,[32] although the court's reasoning was later characterized by the same court as unsound.[33]

Thus, with the advent of large metropolitan areas and the establishment of permanent courts, pretrial proceedings probably became a preferred method for efficiently settling evidentiary and other matters ahead of trial so that the trial itself would not be unduly prolonged. This technique, apparently adopted jointly by the bench and the bar in the name of efficiency, led to the beginning of *in camera* hearings and pretrial proceedings from which the public was excluded.

But curiously, while there were challenges to such exclusions, the challenges never came from members of the public or the press, so that this Court in this case will have its first opportunity squarely to review the question of the press and the public right to attend pretrial proceedings.

Once begun, the trend referred to above toward destroying the open court provision was joined by other courts which found that the right was the defendant's to waive at will,[34] or that there was no reversible error unless prejudice of some form was demonstrated.[35] Some courts upheld exclusion

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27 3 A. Beveridge, *supra* note 21 at 483.

28 F. Heller, The Sixth Amendment 142 (1951).

29 1 F. Lieber, On Civil Liberty and Self-Government 134 (3d ed. rev. Philadelphia 1874) (1st ed. 1853).

30 State v. McCool, 34 Kan. 617, 9 P. 746 (1886).

31 Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (1886).

32 People v. Swafford, 65 Cal. 223, 3 P. 809 (1884).

33 People v. Hartman, 103 Cal. 242, 37 P. 153 (1894).

34 *See* Benedict v. People, 23 Colo. 126, 46 P. 637 (1896); Henderson v. State, 207 Ga. 206, 60 S.E.2d 345 (1950); People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (1900) (exclusion of general public upheld when defendant could designate friends he wanted to remain).

35 *See* Reagan v. United States, 202 F. 488 (9th Cir. 1913); Clemons v. State, 17 Ala. App. 533, 86 So. 177 (1920). As a practical matter, however, the public trial right would be negated if a

orders without reaching the merits by finding that the defendant failed to object in a timely manner or failed to request that any particular members of the audience be exempted from an exclusion order.[36]

Many courts, however, have maintained a broad view of the public trial guarantee. For example, in *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897),[37] the Michigan Supreme Court ruled unconstitutional a statute that had authorized lower court judges to exclude from courtrooms all parties except members of the press and friends of defendants.

Other courts, adopting the reasoning of *Yeager*, understood that the benefits of the public trial provision inure not only to the defendant[38] but to the public and the judiciary.

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showing of prejudice were required, since it is almost impossible to point to any specific injury due to the absence of an audience. United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944). It is also questionable whether the state should oblige the defendant to carry the burden of demonstrating the harm of the state's misconduct. Note, *supra* note 18 at 1149.

36 *See* Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935); Dutton v. State, 123 Md. 373, 91 A. 417 (1914); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933).

37 *Accord*, United States v. Kobli, *supra* note 35; Davis v. United States, 247 F. 394 (8th Cir. 1917) (per curiam); State v. Wade, 207 Ala. 1, 92 So. 101 (1921); People v. Hartman, 103 Cal. 242, 37 P. 153 (1894); Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908); State v. Schmit, 139 N.W.2d 800 (Minn. 1966); Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918); State v. Hensley, 75 Ohio St. 255, 264, 79 N.E. 462, 464 (1906); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294 (1948).

38 Indeed, there is some question as to whether the public trial provision was initially envisioned as a protection for the defendant. M. Radin, The Right to a Public Trial, 6 Temple L.Q. 381, 383-384 (1932).

Among the bases for decisions supporting complete openness of all trial procedures are that it (1) checks judicial abuse and arbitrariness;[39] (2) discourages false testimony;[40] (3) provides notice of proceedings to witnesses who may have additional information;[41] (4) aids in appraisal of the judicial process;[42] and (5) educates the public and induces greater respect for the judicial process.[43] Decisions like these, grounded on considerations of public policy, establish clearly that the right of the public to attend all stages of a post-indictment proceeding is to be protected, not only as a right of the accused but as a right of the public itself.

Cases that have implemented a broad public policy perspective in interpreting the public trial right have exhibited a more thorough analysis of the purposes contemplated by that right. Typically, courts advocating a narrow view summarily conclude that the exclusion in a given case was within the judge's discretion – a conclusion that could just as easily have been reached in the absence of a Constitutional mandate that trials are to be public. Moreover, many de-

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39 In Re Oliver, 333 U.S. 257, 270 (1948); United States v. Kobli, *supra*, note 35 at 921; People v. Jelke, 308 N.Y. 56, 62, 123 N.E.2d 769, 771-772, 48 A.L.R.2d 1425, 1430 (1954).

40 State v. Schmit, *supra* note 37 at 806-807; People v. Jelke, *supra* note 39, 308 N.Y. at 52, 123 N.E.2d at 772.

41 United States v. Kobli, *supra* note 35 at 921; Tanksley v. United States, *supra* note 35 at 59; State v. Schmit, *supra* note 37 at 807; People v. Jelke, *supra* note 39, 308 N.Y. at 63, 123 N.E.2d at 772.

42 State v. Hensley, *supra* note 37, 75 Ohio St. at 266, 79 N.E. at 463-464; Neal v. State, *supra* note 37, 86 Okla. Crim. at 289, 192 P.2d at 297 (1948).

43 Note, *supra*, note 18 at 1139.

cisions on the merits which upheld the exclusion of members of the public and the press were based on nineteenth century notions of gentility and taste, or on the clearest type of present dangers to court proceedings, such as brawls and disorders in the courtroom. Until very recently, courts have not presumed to challenge Chief Justice Marshall's understanding that even the most highly prejudicial information is an inadequate justification for secret proceedings.[44]

E. Conclusion

For the foregoing reasons, Amicus asserts that this is not a case of the press seeking to obtain access to information

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[44] *Cf.* Estes v. Texas, 381 U.S. 532 (1965) (implied prejudice to accused warrants exclusion of television cameras); Oliver v. Postel, 30 N Y.2d 407, 282 N.E.2d 306 (C.A. 1972) (overturning lower court's exclusion order aimed specifically at the news media). As late as 1932, one commentator noted that there was a consensus among the courts on the following limitations on exclusion:

(1) The court need not admit the public beyond the limits of the courtroom's normal capacity. It need not permit the aisles to be crowded or the corridors to be filled so as to prevent orderly ingress and egress.

(2) The court may order the removal of individual spectators whose conduct renders them dangerous or an obstruction to the trial.

(3) The court may exclude most of the public or certain classes of the public, if the testimony is likely to be obscene or offensive.

M. Radin, *supra* note 38 at 390. He added that it was established that courts could not exclude the press, except for personal misconduct. *Id.* at 391.

"[N]o court has gone so far as affirmatively to exclude the press." In re Oliver, 333 U.S. 257, 272 n.29 (1948).

which it has no right to obtain by using the First and Sixth Amendments as "a Freedom of Information Act."[45]

Rather, the opinion of the Pennsylvania Supreme Court voids a long-established, well-recognized and vested right in the public and the press under the First and Sixth Amendments to attend and report on all formal court proceedings – a right that should be not eroded by this Court except upon a clear and convincing showing of a serious and imminent threat to the administration of justice in each case in which a secrecy motion is made.

Even if changed circumstances in the news media and in society in general were to convince this Court to be more solicitous of the defendant than Chief Justice Marshall was in the Burr trial, this concern should not be used to destroy the ancient right of the public to demand accountability of the judiciary without clear evidence, in each case, that secrecy is the only alternative available. This Court should not deviate from the line of cases favoring extended public access to information about court proceedings[46] without such a showing.

Amicus contends that no such evidence has been presented in the instant case.

It is one thing to hold, as this Court has, that judges are absolutely immune from suit for judicial acts, even when such acts are erroneous, malicious, or in excess of their au-

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[45] Houchins v. KQED, Inc., 46 U.S.L.W. 4830, 4833 (U.S. June 26, 1978).

[46] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941).

thority. *Stump v. Sparkman*, 46 U.S.L.W. 4253 (U.S. March 28, 1978). It is quite another to grant judges the broad authority exercised in this case to perform their judicial acts outside the scrutiny of the public, represented in most cases by the press. The combination of two such rulings would not only invite judicial abuse but cause grave misgivings in the public mind as to how the judicial branch of its government is actually carrying out its duties.

II

CLOSED POST-INDICTMENT PROCEEDINGS INVITE ABUSE BY JUDGES, PROSECUTORS, DEFENSE COUNSEL AND LAW ENFORCEMENT PERSONNEL

A. Trial Judges and Counsel Are Vulnerable to Political Pressure and Thus Require Public Scrutiny.

Politics influences the local and state judiciary to a considerable extent. All of the states and the District of Columbia are committed to some element of electoral review in the selection or retention of judges. Partisan election of judges takes place in fifteen states.[47] In eighteen states trial judges are elected on a non-partisan basis.[48] Ten states favor indirect review by either legislative or gubernatorial appointment.[49] The remaining states use merit selection plans in which an elected government official plays a key role in selecting a judge from a list prepared by an appointed commission.[50] While these selection systems attempt to eliminate

[47] American Judicature Society, Judicial Selection and Retention in the United States: A State-by-State Compilation (rev'd 1978).

[48] *Id.*

[49] *Id.*

[50] *Id.*

partisan politics from the selection process, in fact, politics may directly affect appointments because of its effect on the official with the power to appoint.[51] As a result, public scrutiny of the official acts of the state judiciary is vital to its integrity.

The federal judiciary, too, is affected by partisan politics. In the appointment of federal judges, presidential politics, senatorial courtesy and the patronage system are well-known and documented factors. For the federal judiciary, appointed for life, public scrutiny may be the only effective restraint on potential abuse.

It is well recognized that political motivation can affect the impartiality of judges; this Court implied as much in *Sheppard v. Maxwell*, 384 U.S. 333, 342 (1966):

> The case came on trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge * * * was a candidate to succeed himself.

Moreover, in his book concerning New York City judges, Jack Newfield has documented the role of politics in judicial policymaking.[52] His research shows that politics and political parties play a role in "fixing" cases, motions and appeals.[53] Similarly, this Court has noted the political influences of segregationist politics on trial judges in the South.[54]

[51] Thode, Reporter's Notes to Code of Judicial Conduct 96 (1973).

[52] J. Newfield, Cruel and Unusual Justice 81-190 (1974).

[53] *Id.* at 127.

[54] Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935).

A more recent example of the problems of political corruption in the judiciary is illustrated by the recent indictment of Judge Samuel DeFalco, Surrogate for New York County.[55] The 500-page indictment (which curiously has remained sealed) details an alleged net of corruption, based on political friendships, in connection with the disposition of trusts and estates in New York County.[56]

Amicus does not want to be understood as making a blanket indictment of any judicial system, state or federal. We fully recognize that cases of judicial misbehavior are rare indeed. But the point is that so long as there is both the opportunity for improprieties and occasional demonstrations that they do occur, the public must at least have the assurance that it is being kept informed.

Political influence and pressure can also affect another crucial participant in the judicial process – the prosecutor. Prosecutors face the same re-election concerns as other politicians and may even run on the same political ticket as the local trial judge. Since most candidates for new judgeships are former prosecutors,[57] they can be expected to seek the approval of the partisan political establishment to obtain appointment or election to the bench. To ensure such political support, a prosecutor often seeks a high conviction record. Thus, for political reasons, a prosecutor will ordinarily select for trial those cases with a high chance of success[58] and may try to dispose of, or even cover up, cases

55 People v. DeFalco, Indict. No. 462-78 (New York County Supreme Ct., Feb. 14, 1978).

56 *Id.*

57 President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 148 (1967).

58 McIntyre and Lippman, *Prosecutors and Early Dispositions of Felony Cases*, 36 A.B.A.J. 1154 (1970).

where the probability of conviction is low or the risk of political liability is high.[59]

The principle of public accountability does not stop with participants who are subject directly or indirectly to electoral review. The competency of lawyers themselves has been the subject of a recent controversy sparked, in part, by remarks by the Chief Justice of the United States, in which he suggested that a large number of lawyers who try cases are inadequately trained.[60]

Lawyers, as public officers of the court, play an important role in the administration of justice – particularly lawyers in public defender offices. Politics can affect public defender offices[61] because they are dependent upon public funding by elected officials. Thus, there is always the possibility that the political pressure of the purse could affect a public defender's decisions.

The public has the right to expect that criminal proceedings will be conducted with equality and fairness and that court personnel will perform properly.[62] It is imperative

59 This Court should take judicial notice of the controversy surrounding the Justice Department during Watergate, and the allegations that the Attorney General and some of his subordinates were less than diligent in their efforts to uncover the identities of the ultimate culprits.

60 Remarks of Chief Justice Burger before American Bar Association, August 9, 1978.

61 Friloux, *Equal Justice Under Law: A Myth Not a Reality*, 12 Am. Crim. L. Rev. 691, 692 (1975).

62 Yankelovich, Skelly and White, Inc., The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders 27 (1978) (prepared for the National Center for State Courts) [hereinafter cited as Yankelovich]. Copies of this survey were lodged with the Clerk of the Court upon the filing of the *Amicus Curiae* brief in Support of Petitioner in the *Gannett* case, *supra.*

that all participants in the administration of justice be accountable to the public. Because the judicial process is so intermingled with the political process, Amicus believes that to provide the requisite accountability, judges, prosecutors and others involved in the judicial system must be subjected to the broadest public scrutiny.

B. The Public Needs News Reports of Pretrial Proceedings To Exercise Effectively its Franchise in the Election of Judges and its Overview of Appointed Judges.

To participate effectively in the political process, the public needs information concerning governmental officials. This Court has recognized "that a major purpose of [the First] Amendment was to protect free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Judges, especially elected judges, should not be immune from effective public scrutiny. As this Court noted in *Cox Broadcasting, Inc. v. Cohn*, 420 U.S. 469, 495 (1975), "the citizenry is final judge of the proper conduct of public business." More recently, this Court recognized that public exposure of alleged judicial misconduct lies "near the core of the First Amendment." *Landmark Communications, Inc. v. Virginia*, 56 L. Ed. 2d 1, 10 (1978). In *Landmark*, Mr. Chief Justice Burger noted for the Court the importance of public access to information concerning the courts, stating, "The operations of the courts and the judicial conduct of judges are matters of utmost public concern."[63]

However, because of the nature and operations of the judiciary, the public is frequently deprived of complete and

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63 Landmark Communications, Inc. v. Virginia, 56 L.Ed.2d 1, 10.

adequate information concerning the administration of justice.[64] Authorizing judges to close pretrial hearings will decrease the flow of already inadequate information and thereby destroy the public's ability to make effective judicial choices.

One reason for the lack of public information and understanding is the low visibility of the judiciary.[65] Seventy-four percent of the public has little or no familiarity with state courts.[66] Sixty-three percent has little or no familiarity with local courts, and seventy-seven percent has little or no familiarity with federal courts.[67]

Information about the judiciary is desperately needed by the public, as was demonstrated by a recent poll sponsored by the Ford Foundation and discussed on June 7-9, 1978 at a conference in Williamsburg, Virginia, sponsored by the National Center for State Courts. Inadequate information leads to widespread misunderstanding about the judicial process. For example, thirty-seven percent of the public believes that a person accused of a crime must prove his or her innocence.[68] Moreover, lack of adequate information may contribute to public apathy and skepticism about the administration of justice. One out of four people believes that court decisions are primarily affected by political considerations.[69] Of per-

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64 *Cf.* Yankelovich *passim;* Adamany and Dubois, *Electing State Judges*, 1976 Wisc. L. Rev. 731, *passim.*

65 Adamany and Dubois, *supra* note 64 at 771.

66 Yankelovich at 3.

67 *Id.*

68 *Id.* at 1.

69 *Id.* at 35.

sons familiar with the courts, forty-eight percent perceive a great or moderate need for reform.[70] Eighty-eight percent of the people with court experience and eighty-three percent of the people with no court experience believe that efficiency in the courts is a serious problem.[71] Only nineteen percent of the people with court experience and twenty-six percent of those with no court experience are extremely or very confident about the courts.[72] Amicus believes that much of this skepticism is due to the low visibility of the judiciary. Closing post-indictment proceedings can only decrease visibility still further and tend to increase public skepticism about our court system.

A significant result of the low visibility of the judiciary is that the public lacks the knowledge to exercise intelligently its voting franchise. Judicial elections are characterized by low levels of information and participation. For example, only one percent of the voters in New York City, Buffalo, and rural Cayuga County could recall the name of the chief judge whom they had reelected.[73] A consumers' organization in New York reported that ninety percent of the people leaving the polls could give no explanation for their vote for a candidate for the bench other than party label, and most had difficulty remembering the name of the candidate for whom they voted.[74] One New York City judge was reelected without opposition soon after he had been indicted on two counts of perjury before a grand jury,

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70 *Id.* at 18.

71 *Id.* at 17.

72 *Id.*

73 Adamany and Dubois, *supra* note 64 at 775.

74 J. Newfield, *supra* note 52 at 152.

in connection with allegations that he had fixed criminal cases.[75]

Closed proceedings and censored press reports can only increase this public ignorance about the judiciary. As Wigmore has noted:

> The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy. [6 J. Wigmore, Evidence in Trials at Common Law § 1834 at 438-439 (Chadbourn rev. 1976).]

Moreover, judges who wish to prevent proper criticism of their conduct are more likely to close post-indictment proceedings.[76] "Those who would order proceedings closed would be among those whose performance of official duties would be cloaked by the closing."[77] It has been noted that exposure of a judge's actions "may reveal much about his fitness to fill his office even though his acts do not prejudice the defendant in any way."[78]

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75 Rinaldi v. Holt, Rinehart and Winston, Inc., 42 N.Y.2d 369, 371 (C.A. 1977).

76 Rifkind, *When the Press Collides With Justice*, in Selected Essays on Constitutional Law 651, 653 (Ass'n of American Law Schools ed. 1963).

77 Fenner and Koley, *The Rights of the Press and the Closed Criminal Proceeding*, 57 Neb. L. Rev. 442, 481 (1978).

78 United States v. Cianfrani, 573 F.2d 835, 853 (3d Cir. 1978).

Effective public accountability for judges is also hindered by the fact that judges have extraordinarily long terms of office. In New York, for example, a trial judge is elected for a fourteen year term.[79] Without periodic review, a judge is almost entirely immune from direct accountability. The power to remove from public scrutiny his disposition of ninety percent of his criminal docket can only have the effect of decreasing any feeling of accountability. "Exposure is the only control over the corrupt and the petty, the tyrannous and the weak, the unjust, incompetent and the incapacitated."[80]

In part because of the independence and insulation of the judiciary, the public depends almost entirely upon the press for its information concerning the judiciary. As stated by this Court in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 491-492:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of govern-*

79 State of New York, Twenty-Second Annual Report of the Judicial Conference and the Office of Court Administration 3 (1977).

80 Fenner and Koley, *supra* note 77 at 478.

> *ment generally.* With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. [Emphasis added.]

Even persons who have had courtroom experience depend on the press for information about the judiciary.[81] Seventy-one percent of the general public believes that the media should play a role in demonstrating the effectiveness of courts and seventy percent wants the media to show how the court system works.[82]

To deny the press the opportunity to report on post-indictment proceedings, therefore, is to deny the public the opportunity to receive information concerning its public servants. Without news reports the public will remain unfamiliar, skeptical, and confused about the court system. Voter turnout will remain low, and inefficient or corrupt judges will be more likely to stay in office. Only with first-hand news reports of pretrial proceedings – in which much of the judiciary's work is done – can the public prepare itself to participate meaningfully in the political and electoral process.

C. Open Preliminary Hearings Serve as a Crucial Safeguard Against Abuse of the Law Enforcement System.

The concept of open trials developed in order to ensure integrity, honesty, and equality in the administration of justice. Thus, in addition to ensuring meaningful public parti-

81 Yankelovich at 2.

82 *Id.* at 13.

cipation in selecting judges, open post-indictment proceedings help prevent the possibility of abuse of the judicial process. As this Court noted in *In re Oliver*, 333 U.S. 257, 270 (1948), "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power."

As the overseers of the public business, the public, and, therefore, the press, have a vested interest in the conduct of every stage of judicial proceedings. According to this Court, "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). To fulfill its role as a check against governmental abuse, the public has a need for and a right to immediate and adequate information on the performance of its public servants.

Open proceedings are especially important as the means of facilitating public scrutiny during the course of all phases of the *criminal* process. The public and the press should be permitted to be present at hearings involving alleged crimes "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned * * * rather than permit[ting] such crucial steps in the criminal process to become associated with secrecy." *United States v. Clark*, 475 F.2d 240, 246-247 (2d Cir. 1973). Criminal proceedings, and in particular preliminary hearings, are crucial sources of information about law enforcement and its effectiveness.

As Mr. Justice Brennan noted in his concurring opinion in *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 605-606:

> [D]isclosure of the circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice. * * *

Law enforcement is a major concern of the American public. At present eighty-eight percent of the public views crime as a leading problem facing the United States.[83] The public looks to the judicial process as a key component in effective law enforcement.[84] Forty-three percent of the general public criticizes the courts for not reducing violent crime.[85] Because nearly nine out of ten criminal cases are completed prior to trial, it becomes imperative that the public have access to information concerning those pretrial processes. "Secrecy * * * can only breed ignorance and distrust of courts * * *." *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 587 (Brennan, J., concurring).

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83 *Id.* at 27.

84 President's Commission on Law Enforcement and Administration of Justice, *supra* note 57 at 128.

85 Yankelovich at ii.

As noted above, matters before the court in a post-indictment proceeding can be the crucial factors determining the outcome of a case. Among major issues normally decided in preliminary proceedings are the suppression of evidence based upon illegal searches, illegal seizures, or illegal entrapments; the suppression of involuntary confessions; the dismissal of indictments; the severance of defendants; the striking of defenses; the challenge to the voluntariness of pleas; the selection of juries; the determination of pretrial release conditions; and the appointment of counsel for indigents. Such proceedings shed light upon the capabilities and integrity of law enforcers. For example, a hearing on a motion to suppress a coerced confession may not only provide the public with information about the ineffectiveness of its public servants, but also explain why so many allegedly "guilty" persons go free. As Wigmore has recognized, trial participants working "'under the public gaze" are "more strongly moved to a strict conscienciousness in the performance of duty."[86]

Public exposure is necessary because "[j]udges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of judicial power, others might exercise it to prevent proper criticism of their own administrations."[87] Moreover, because it is extremely difficult to prove abuses of judicial discretion, judges have effective immunity from attacks in court with respect to most of their judicial acts. *Pierson v. Ray*, 386 U.S. 547 (1966). Thus, public scrutiny may serve as the only effective counterweight.

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86 6 J. Wigmore, Evidence in Trials at Common Law § 1834 at 438 (Chadbourn rev. 1976).

87 Rifkind, *supra* note 76 at 653.

A report by The New York State Commission on Judicial Conduct on abuses occurring during judicial proceedings indicates the importance of keeping all such proceedings open.[88] Such irregularities include the failure to render decisions on motions;[89] delays in dismissals;[90] questioning plaintiffs in a way that departs from the role of impartial judicial officers;[91] excoriating plaintiffs;[92] accusing attorneys of improper conduct;[93] rudeness and unwillingness to listen to those making proper applications;[94] interfering with the selection of juries;[95] exerting pressure on attorneys to settle by threats of retaliation;[96] prejudging the merits of cases;[97] refusing to honor attorneys' affidavits of actual engagement;[98] arbitrarily denying reasonable requests for adjournment;[99] negotiating with police officers for the with-

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88 New York State Commission on Judicial Conduct, Annual Report 96 (January 1978).

89 *Id.* at 96.

90 *Id.*

91 *Id.* at 104.

92 *Id.*

93 *Id.* at 105.

94 *Id.*

95 *Id.* at 103.

96 *Id.* at 105.

97 *Id.*

98 *Id.*

99 *Id.*

drawal of charges against friends;[100] sentencing defendants in a proceeding without having notified either the prosecuting attorney or defense counsel and even striking defendants.[101]

Similar abuses can occur because of prosecutorial abuse. Prosecutors have been granted the same common law immunity that judges enjoy.[102] Therefore, the only adequate check against abuses of their position is "the knowledge that their assertions will be contested * * * in open court." *Butz v. Economu*, 46 U.S.L.W. 4952, 4961 (U.S. June 29, 1978).

Exposure not only will protect against abuse by judges and prosecutors, but will guard against further abuse by those officials whose actions are called into question at pretrial hearings.[103] For example, pretrial proceedings frequently expose the maltreatment of prisoners by law enforcement officers during interrogations. Such abuses include physical brutality;[104] threats of physical brutality;[105] removal of prisoners from jail at night for questioning in secluded places;[106] keeping prisoners unclothed or standing

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100 *Id.*

101 *Id.*

102 Imbler v. Pachtman, 424 U.S. 409 (1976).

103 United States v. Clark, 475 F.2d 240, 246-247 (2d Cir. 1973).

104 Brown v. Mississippi, 297 U.S. 278 (1936).

105 Malinski v. New York, 324 U.S. 401 (1945).

106 White v. Texas, 310 U.S. 530 (1940); Vernon v. Alabama, 313 U.S. 547 (1941).

on their feet for long periods during questioning;[107] deprivations of sleep to sap a prisoner's strength;[108] disregard for the need for food;[109] threat of a lynch mob;[110] deception;[111] threats against a defendant's family;[112] misrepresentation of a co-defendant's confession in order to induce a confession;[113] protracted periods of questioning;[114] and holding a suspect incommunicado for days.[115]

Alleged abuse by police officers and other law enforcement officials during searches for evidence are often the subject of pretrial hearings. Examples of such abuses include the seizure of property without warrant when there was ample time to obtain one;[116] a three-hour warrantless search of a sixteen-room house and massive seizures;[117] an exhaustive search of a cabin and the seizure of its entire

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107 Lomax v. Texas, 313 U.S. 544 (1941).

108 Chambers v. Florida, 309 U.S. 227 (1940); Leyra v. Denno, 347 U.S. 556 (1954).

109 Payne v. Arkansas, 356 U.S. 560 (1958).

110 *Id.*

111 Spano v. New York, 360 U.S. 315 (1959).

112 Harris v. South Carolina, 338 U.S. 68 (1949).

113 Frazier v. Cupp, 394 U.S. 731 (1969).

114 Ashcraft v. Tennessee, 322 U.S. 143 (1944).

115 Davis v. North Carolina, 384 U.S. 737 (1966).

116 Trupiano v. United States, 334 U.S. 699 (1948).

117 Von Cleef v. New Jersey, 395 U.S. 814 (1969).

contents without a warrant;[118] a four-day warrantless search of entire premises and the seizure of 200-300 items;[119] a warrantless entry and seizure by IRS agents;[120] the misrepresentation of facts to establish probable cause in a warrant affidavit;[121] an illegal search without a warrant of a footlocker not in the immediate control of the owners;[122] a warrant issued by a law enforcement officer who was in charge of the investigation and the key prosecutor;[123] a warrantless search of an entire home at the time of arrest extending beyond the area under the defendant's immediate control;[124] an unreasonable, warrantless search and seizure of a union office when union officials had a reasonable expectation of the privacy of their records;[125] a warrant issued without sufficient information for a finding of probable cause;[126] governmental wiretapping and recording of a defendant's telephone conversation in violation of the Fourth Amendment;[127] and the failure to obtain a warrant from a neutral and detached magistrate.[128]

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118 Kremen v. United States, 353 U.S. 346 (1957).

119 Mincey v. Arizona, 46 U.S.L.W. 4737 (U.S. June 21, 1978).

120 G.M. Leasing Corp. v. United States, 429 U.S. 338 (1976).

121 Franks v. Delaware, 46 U.S.L.W. 4869 (U.S. June 26, 1978).

122 United States v. Chadwick, 433 U.S. 1 (1977).

123 Coolidge v. New Hampshire, 403 U.S. 443 (1971).

124 Chimel v. California, 395 U.S. 752 (1969).

125 Mancusi v. DeForte, 392 U.S. 364 (1968).

126 Spinelli v. United States, 393 U.S. 410 (1969)

127 Katz v. United States, 389 U.S. 347 (1967).

128 Johnson v. United States, 333 U.S. 10 (1948).

Such abusive tactics have a dramatic effect upon law enforcement. A guilty person can be allowed back on the street because of illegal police practices. An innocent person can be deprived of his Constitutional rights. The public has a right to know about these abuses so that it may reform the system. A critical step in improving the conduct of law enforcement officials is to permit the press to report on post-indictment proceedings.

CONCLUSION

Amicus began this brief with a review of the American concept of open courts dating back to the days before our Constitution was written when the colonies were still much affected by the British system, including both its protections and abuses. The Framers of the Sixth Amendment intended our courts to be open at all stages of their proceedings -- and in fact the courtrooms of this nation were probably *the single most important public forum* for the airing of local political and legal controversies during the period when America was primarily a rural nation.

With the emergence of large urban metropolitan areas, the local county courtroom *public forum* has been replaced by ever-growing and increasingly congested metropolitan court systems; and this demographic change has made it impossible for the average citizen to come to his court, as he did in the 18th and 19th centuries, to view the performances of justice in person.

This has meant, of course, that the citizen must rely more and more on the press to be his or her surrogate by monitoring courtroom proceedings. But the fundamental principle, envisioned by the Framers of the First and Sixth Amendments, should remain the same: our courts are *public forums*, and this Court should not suppress these

forums without strict procedural safeguards and overwhelming evidence of a clear and present danger to the administration of justice. *Southeast Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

Open courts provide safety and the assurance of justice for us all. Closed courts invite public mistrust and official malfeasance. We respectfully suggest that this is no time in our history to allow courts to avoid the strong strictures of *Nebraska Press Ass'n v. Stuart* by the simple device of closing their doors.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
SARA-ANN DETERMAN

Hogan & Hartson
815 Conn. Ave., N.W.
Washington, D.C. 20006

Of Counsel:

JACK C. LANDAU
The Reporters Committee
for Freedom of the Press

SUPREME COURT OF PENNSYLVANIA

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
1414 THREE PENN CENTER PLAZA
PHILADELPHIA, PENNSYLVANIA 19102
(215) 567-3071 – 686-3578

ALEXANDER F. BARBIERI
JUDGE
COURT ADMINISTRATOR OF PENNSYLVANIA

August 9, 1978

DEPUTY COURT ADMINISTRATORS
CARLILE E. KING, ESQUIRE
GERALD W. SPIVACK, ESQUIRE
LARRY P. POLANSKY, ESQUIRE

Jack C. Landau, Esquire
The Reporters Committee for Freedom
of the Press
Room 1112
1750 Pennsylvania Avenue - N.W.
Washington, D.C. 20006

Dear Mr. Landau:

Re: Philadelphia Newspapers, Inc.,
et al. v. Jerome, et al.
Supreme Court of the United
States - No. 78-155

Samuel E. Klein, Esquire, appellants' counsel in the above matter, has asked that I advise you on behalf of the appellees that we have no objection to your filing an amicus brief on behalf of the Reporters Committee.

We look forward to your participation.

Very truly yours,

Alexander F. Barbieri
Court Administrator of Pennsylvania

By: Jonathan Vipond, III
Staff Attorney

JV:ml

cc: Samuel E. Klein, Esquire

APPENDIX A

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MEMBERS
DISTRICT OF COLUMBIA BAR

August 3, 1978

Jack C. Landau, Esquire
The Reporters Committee for
Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Philadelphia Newspapers, Inc., et al. v. Jerome, etc. -- Supreme Court of the United States No. 78-155

Dear Jack:

The Reporters Committee has my consent to file an amicus brief in the above matter on or before August 14, 1978. I have also spoken with Jonathan Vipond, III, counsel for Appellees, and have been advised that he likewise consents to the filing of an amicus brief.

Mr. Vipond will forward you a letter to this effect in the near future.

Sincerely yours,

Sam

Samuel E. Klein

SEK:tbd

APPENDIX A

AFFIDAVIT

WILLIAM E. NELSON, being duly sworn, deposes and says,

1. I am an Associate Professor of Law at Yale Law School in New Haven, Connecticut.

2. I have authored a book entitled The Americanization of the Common Law.

3. During the course of my research on that book, I read every case that exists on record, as far as I know, in the Commonwealth of Massachusetts between the years of 1760 and 1830, with the exception of cases dealing with probate, divorce, and matters before the legislature.

4. In examining those records, I found no indication that the public had ever been excluded from any stage of any proceeding, including post-indictment proceedings in criminal cases.

5. Therefore, it would be my opinion, based on my research, that the common law and the common understanding of the period was that the public had a right to attend all stages of criminal proceedings.

William E. Nelson

WILLIAM E. NELSON

Dated:

Sworn to before me this
7th day of July, 1978

Patricia T. Gunnoud

PATRICIA T. GUNNOUD
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1981

APPENDIX B